130-230

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~165.~~ 190

ROBERT S. STEVENS, PLAINTIFF IN ERROR,

vs.

WILLIAM NICHOLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED OCTOBER 28, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 465.

ROBERT S. STEVENS, PLAINTIFF IN ERROR,

vs.

WILLIAM NICHOLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA, *ss:*

{Seal of the United States Circuit Court for the Western District of Missouri, Eastern Division.}

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern division of the western district of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the April term, 1885, thereof, between William Nichols, plaintiff, and The Texas & Atlantic Refrigerator Car Company, Robert S. Stevens, and Henry D. Mirick, defendants, a manifest error hath happened to the great damage of the defendant, Robert S. Stevens, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri.

Allowed by—
A. KREKEL, *Judge.*

2 [Endorsed:] No. 1727. United States circuit court, western district of Missouri, eastern division. Wm. Nichols *vs.* Robert S. Stevens. Writ of error to the circuit court of the U. S. for the east'n div. of the west'n dist. of Missouri. Returned and filed — day of ——, 187–. —— ——, clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
Eastern Division of the Western District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at the city of Jefferson, this thirteenth day of October, A. D. 1885.

{ Seal of the United States Circuit Court for the Western District of Missouri, Eastern Division. }

H. C. GEISBERG, *Clerk.*

3 The United States of America to William Nichols, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Missouri, eastern division, wherein Robert S. Stevens is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arnold Krekel, judge of the circuit court of the United States for the eastern division of the western district of Missouri, this 12th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

A. KREKEL, *Judge.*

4 [Endorsed:] United States circuit court, western district of Missouri, eastern division. Wm. Nichols *vs.* Robert S. Stevens. Citation. Filed —— —, 187–. —— ——, clerk.

UNITED STATES OF AMERICA, *Western District of Missouri,* } *ss:*

I hereby acknowledge due service of the within citation this 12th day of Sept., A. D. 1885.

GEO. P. B. JACKSON,
Attorney for Defendant in Error.

5 UNITED STATES OF AMERICA, *Eastern Division of the Western District of Mo.,* } *sct:*

Pleas before the honorable circuit court of the United States in and for the eastern division of the western district of Missouri, at the April term, A. D. 1885, thereof, in the case of William Nichols, plaintiff, *vs.* The Texas & Atlantic Refrigerator Car Company *et al.*, defendants, No. 1727.

Be it remembered that heretofore, to wit, on Friday, the 13th day of April, A. D. 1883, it being in vacation of the circuit court of the United States in and for the eastern division of the western dis-

trict of Missouri, the following proceedings were had in this case, to wit:

WM. NICHOLS
vs.
THE TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

This day there is received and filed herein the transcript of the record and proceedings in the above-entitled case as certified from the circuit court of Pettis county, Mo.

And said transcript so filed as aforesaid is in the words and figures following, to wit:

Transcript.

STATE OF MISSOURI, *County of Pettis:*

Pleas before the circuit court of Pettis county at a term begun and holden in the city of Sedalia, county and State aforesaid, on the 2nd day of January, 1883, before the Honorable John P. Strother, judge of the sixth judicial circuit of the State of Missouri.

6 WILLIAM NICHOLS, Plaintiff,

vs.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS, and HENRY MIRICK, Defendants.

Be it remembered that heretofore, to wit, on the 25th day of Jan'y, 1881, a petition was filed in the above-entitled cause in the office of the clerk of the circuit court in and for the county of Pettis in words and figures following, to wit:

Petition.

In the Circuit Court of Pettis County, Missouri. January Term, 1881.

WILLIAM NICHOLS, Plaintiff,

vs.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS, and HENRY D. MIRICK, Defendants.

Plaintiff states that the defendant, The Texas and Atlantic Refrigerator Car Company, was, on May 1st, 1875, ever since has been, and now is, a corporation duly created and organized under the laws of the State of Missouri and having its chief office in Pettis county, Missouri.

That on the 6th day of May, 1875, said corporation, by its president and duly authorized agent, executed and delivered its certain promissory note, dated on that day, to one J. R. Barrett, whereby it promised, for value received, to pay three months after the date thereof to the order of J. R. Barrett, at the Commercial Bank of St. Louis,

the sum of fifty-eight hundred dollars, which said note was afterwards by said J. R. Barrett endorsed and delivered to this plaintiff for a valuable consideration.

7 That on the 14th day of May, 1875, the said corporation, by its president and duly authorized agent, executed and delivered to said J. R. Barrett its other certain promissory note, dated on that day, whereby it promised, for value received, to pay three months after date thereof to the order of J. R. Barrett, at the Commercial Bank of St. Louis, the sum of forty-two hundred dollars, which said note was afterwards by said J. R. Barrett endorsed and delivered to this plaintiff for a valuable consideration.

That, default having been made in the payment of both of said notes, this plaintiff brought suit upon both of said notes in the circuit court of Pettis county, Missouri, on December 11th, 1875, against said corporation, and on the 26th day of January, 1876, at the January term, 1876, of said court, obtained judgment on said notes against said corporation for the sum of ten thousand three hundred and seventy-seven $\frac{21}{100}$ dollars ($10,377.21), with ten per cent. per annum interest thereon, and for his costs in said suit, taxed at the sum of six $\frac{75}{100}$ dollars.

That afterwards, on the 31st day of January, 1876, this plaintiff caused an execution to be issued on said judgment from the office of the clerk of said court, which said execution was, on the 1st day of February, 1876, placed in the hands of the sheriff of Pettis county, Mo., and was by said sheriff, on the 24th day of February, 1876, levied upon all the property of said corporation which could be found in said county; that said sheriff, on the 7th day of March, 1876, sold said property for the sum of twenty-five dollars, of which he applied to the costs the sum of thirteen dollars and credited upon said judgment the sum of twelve dollars and returned said execution not satisfied as to the balance of said judgment, "there being no other goods, chattels, or property found belonging to the defendant upon which to levy this execution."

8 Plaintiff states that, except said sum of twelve dollars, no part of said judgment has ever been paid, and that the balance thereof, with the interest thereon, remains unpaid and is still due to plaintiff.

Plaintiff further states that the defendant, Robert S. Stevens, is a stockholder in said corporation and has been ever since said May 1st, 1875, holding and owning certificates of stock therein to the amount of five thousand (5,000) dollars; that upon said stock said defendant has paid to said corporation the sum of one thousand dollars, and that the balance of said amount of stock subscribed and held by him is still due and unpaid, and which plaintiff demanded of said defendant on March 7th, 1876.

Plaintiff further states that the defendant, Henry D. Mirick, is a stockholder in said corporation and has been ever since said May 1st, 1875, holding and owning certificates of stock therein to the amount of one thousand dollars; that upon said stock said defendant has paid to said corporation the sum of five hundred dollars, and that the balance of said amount of stock subscribed and held by him

is still due and unpaid, and which plaintiff demanded of said def't on March 7th, 1876.

Plaintiff states that said defendants, Stevens and Mirick, are liable for the respective sums remaining unpaid upon their said certificates of stock, and that plaintiff is entitled to have the same applied upon his said judgment against said corporation.

Wherefore he prays that the defendants be summoned to answer this petition, and that he recover judgment ordering the said respective amounts due by said Stevens and Mirick to said corporation to be applied on his said judgment, and that he recover of said R. S. Stevens the sum of four thousand dollars, with six per
9 cent. per annum interest thereon from March 7th, 1876, and that he recover of said H. D. Mirick the sum of five hundred dollars, with six per cent. per annum interest thereon from March 7th, 1876, and for all proper relief.

PHILLIPS & JACKSON,
Att'ys for Pl't'ff.

Whereupon a summons was issued to the sheriff of Pettis county, Missouri, the 2nd day of February, 1881, and returned by him April the 16th, 1881, executed on the president of the Texas and Atlantic Refrigerator Car Company February the 28th, 1881, and *non est* as to the other defendants.

And afterwards an *alias* summons issued to said sheriff on the 14th day of May, 1881, returned by him Aug. 20th, 1881, executed as to the defendant, Rob't S. Stevens, and *non est* as to defendant, Henry D. Mirick.

And afterwards, to wit, on the 13th day of September, '81, it being the 3rd day of the September term of said court, the following proceedings were had in said cause, to wit:

WILLIAM NICHOLS *vs.* T. & A. REFRIGERATOR CAR CO. *et al.*

Now, at this day, comes the plaintiff, by his attorneys, and also comes R. S. Stevens, by his attorneys, and, by consent, said defendant, R. S. Stevens, has leave to file his answer in sixty days after this time of this court.

And afterwards, to wit, on the 3rd day of January, it being the 1st day of Jan. term, 1882, of said court, the following further proceedings were had in said cause, to wit:

Demurrer Filed.

WM. NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR — CO. *et al.*

10 Now, at this day, comes defendant, R. S. Stevens, by his attorney, and files separate demurrer to the petition of plaintiff herein.

And afterwards, to wit, on the 1st day of February, 1882, it being the 26th day of Jan'y term of said court, the following further proceedings were had in said cause, to wit:

Demurrer Withdrawn. Leave to Plead. Appearance of H. D. Mirick.

WILLIAM NICHOLS

vs.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, R. S. STEVENS, & H. D. MIRICK.

Now, at this day, come the parties hereto, by their respective attorneys, and defendant Stevens now withdraws the demurrer heretofore filed herein, and by consent said defendant has leave to answer sixty days after this term of this court, and defendant, H. D. Mirick, now enters his voluntary appearance herein, and has leave, by consent, to answer sixty days after this term of this court, and this cause is continued.

And afterwards, to wit, on the 21st of April, 1882, in vacation, the following further proceedings were had in said cause, to wit:

WM. NICHOLS

vs.

THE TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.*

APRIL 21, 1882.

Now, at this day, come R. S. Stevens and Henry D. Mirick, def'ts, and file their answer herein, which said answer is in words and figures as follows:

Answer.

In the Circuit Court of Pettis County. January Term, 1882.

WILLIAM NICHOLS, Plaintiff,

vs.

11 THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS, and HENRY D. MIRICK, Defendants.

Now come the above-named defendants, Robert S. Stevens and Henry D. Mirick, and, by leave of court first had and obtained and by consent of parties, make answer to plaintiff's petition in the above-entitled cause, and for their answer they deny generally each and every material allegation in said petition contained; and now, having fully answered, ask to be discharged with their costs in this behalf laid out and expended.

SNODDY & SHORT,

Att'ys for Defendants, Robert S. Stevens & Henry D. Mirick.

And afterwards, on the 4th day of May, 1882, it being the 4th day of May term of said court, the following further proceedings were had in said cause, to wit:

WILLIAM NICHOLS

vs.

TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.*

Now, at this day, come the defendants, Robert S. Stevens and Henry D. Mirick, by their attorney, and file their petition for removal of cause to the United States circuit court for the eastern division of the western district of Missouri; which said petition is in words and figures as follows:

Petition for Removal.

In the Circuit Court of Pettis County, Missouri. May Term, 1882.

WILLIAM NICHOLS, Plaintiff,

vs.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS, and HENRY D. MIRICK, Defendants.

To the honorable circuit court within and for Pettis county,
12 State of Missouri:

Your petitioners, the above-named defendants, Robert S. Stevens and Henry D. Mirick, state that the plaintiff in the above-entitled cause is a citizen of the State of Missouri and your petitioners, the said defendants, are not citizens of the State of Missouri, but are citizens of the State of New York.

They further state that the matter in dispute in above-entitled cause exceeds, exclusive of costs, the sum of five hundred dollars, and that the matter in dispute in said cause is a controversy between the citizens of different States. Wherefore your said petitioners herewith tender and file a bond, with good — sufficient surety, for their entering in the circuit court of the United States of America for the eastern division of the western district of Missouri, on the first day of its next session, a copy of the record in the above-entitled cause and for paying all costs that may be awarded by the said United States circuit court if said court shall hold that such suit is wrongfully or improperly removed thereto, and also for the appearing in said circuit court and entering special bail in the above-entitled suit if special bail was originally requisite in said suit.

Your petitioners therefore pray the court that the above-entitled cause and suit be removed into the circuit court of the United States of America within and for the eastern division of the western district of the said State of Missouri.

ROBERT S. STEVENS &
HENRY D. MIRICK,
By W. W. S. SNODDY,
Their Attorney.

And afterwards, to wit, on the 8th day of May, 1882, it being the 7th day of the May term of said court, the following further proceedings were had in said court, to wit:

13 WILLIAM NICHOLS

vs.

TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY *et al.*

Now, at this day, come defendants, R. S. Stevens and H. D. Mirick, by their attorney, and file bond for removal of this court to the U. S. court; which said bond is in words and figures as follows:

Bond for Removal.

In the Circuit Court of Pettis County, Missouri. May Term, 1882.

WILLIAM NICHOLS, Plaintiff,

against

THE TEXAS & ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS, and HENRY D. MIRICK, Defendants.

We, Robert S. Stevens and Henry D. Mirick, as principals, and —— —— and —— ——, as sureties, acknowledge ourselves to owe and stand indebted to the plaintiff, William Nichols, in the sum of one thousand dollars; for the payment of which, well and truly, we bind ourselves, our heirs, executors, administrators, assigns, &c.

The condition of the above bond is as follows: The defendants, Robert S. Stevens and Henry D. Mirick, in the cause now pending in the circuit court of Pettis county, Missouri, wherein William Nichols is plaintiff and The Texas and Atlantic Refrigerator Car Company and the said Robert S. Stevens and Henry D. Mirick are defendants, as petitioners, have applied or are about to apply to the said circuit court of Pettis county, Missouri, for the removal of said cause from said circuit court of Pettis county, Missouri, to the circuit court of the United States of America within and for the
14 eastern division of the western district of said State of Missouri.

Now, if the said defendants and petitioners, Robert S. Stevens and Henry D. Mirick, shall enter in the said circuit court of the United States within and for the eastern division of the western district of the said State of Missouri, on the first day of its next session, a copy of the record in said suit and pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this bond shall be void; otherwise remain in full force.

Witness our hands and seals this 24th day of April, 1882.

ROBERT S. STEVENS. [SEAL.]
HENRY D. MIRICK. [SEAL.]
A. D. JAYNES. [SEAL.]
S. HIGHLEYMAN. [SEAL.]

And afterwards, to wit, on the 22d day of September, 1882, it being the 9th day of the Sept. term of said court, the following further proceedings were had in said cause, to wit:

WILLIAM NICHOLS

vs.

TEXAS & ATLANTIC REFRIGERATOR CAR COMPANY *et al.*

Now, at this day, this cause having been left off the docket of this term by mistake, the same is ordered redocketed, and the cause is now, by consent, continued, without prejudice, on application for removal to the United States circuit court for the eastern division of the western district of Missouri.

And afterwards, to wit, on the 30th day of January, 1883, it being the 25th day of the January term of said court, the following
15 further proceedings were had in said cause, to wit:

Order for Removal of Cause.

WILLIAM NICHOLS

vs.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY.

Now, at this day, the bond for costs heretofore filed herein by defendants, R. S. Stevens & Henry D. Mirick, is by the court approved, and this cause is ordered removed to the United States circuit court for the eastern division of the western district of Missouri, at Jefferson city, and the clerk of this court ordered to make, without delay, a transcript of the record and proceedings had herein and transport same to the clerk of said U. S. court.

STATE OF MISSOURI, } *ss:*
County of Pettis, }

I, B. H. Ingram, clerk of the circuit court within and for the county and State aforesaid, hereby certify that the above and foregoing is a full, true, and complete transcript of the original papers and record entries had in said court in the above-entitled cause as fully as the same appear of record and on file in my said office; and I further certify that the bill of costs as attached is true and correct.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in Sedalia, this Feb'y 23d, 1883.

[SEAL.]

B. H. INGRAM, *Clerk,*
By M. F. ATHY, *D. C.*

And afterwards, at a regular stated term of the circuit court of the United States in and for the eastern division of the western district of Missouri, begun and held on the third Monday, the 16th

16 day, of April, A. D. 1883, at Jefferson city, in said district, the following further proceedings were had in this case on said last-mentioned day, to wit:

WM. NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

This day there is filed herein the appearance of defendants, Robert S. Stevens and Henry D. Mirick, by James Carr, their attorney, and said appearance so filed is in words and figures as follows, to wit:

Appearance.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri. April Term, 1883.

WILLIAM NICHOLS, Plaintiff,
vs.
THE TEXAS & ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS, and HENRY D. MIRICK, Defendants.

I hereby enter the appearance of Robert S. Stevens and Henry D. Mirick in the above-entitled cause.
April 16th, 1883.

JAMES CARR,
Att'y for Robert S. Stevens & Henry D. Mirick.

And afterwards, at said last-mentioned regular stated term of said circuit —, begun and held as aforesaid at the place aforesaid, the following further proceedings were had in said cause on the 26th day of April in said year, to wit:

WM. NICHOLS
vs.
17 TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

This day come the defendants, R. S. Stevens and H. D. Mirick, by their attorney, E. Silver, Esq., on whose motion leave is granted said defendants to file amended answers within sixty days before the next term of this court.

And afterwards, to wit, on the 18th day of September, 1883, it being in vacation of said circuit court, the following proceedings were had in this case, to wit:

WILLIAM NICHOLS
vs.
TEXAS & ATLANTIC REF. CAR CO. *et al.* } 1727.

This day there is received and filed herein the joint and separate answer of defendants, Robert S. Stevens and Henry Mirick; which

answer so filed as aforesaid is in the words and figures following, to wit:

Joint Amended Answer.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri. April Term, A. D. 1883.

WILLIAM NICHOLS, Plaintiff,

vs.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS, and HENRY MIRICK, Defendants.

The defendants, Robert S. Stevens and Henry Mirick, for their separate and amended answer to the plaintiff's petition filed in the above-entitled cause, deny each and every allegation in said petition.

Defendants, for another and further defence to the cause of action alleged in said petition, state that the pretended judgment described therein was recovered on the promissory notes executed by the Texas and Atlantic Refrigerator Car Company, by its president, J. R. Barrett, to himself as payee, and endorsed in blank by him, as alleged by the plaintiff in his suit against said Texas and Atlantic Refrigerator Car Company in the circuit court of Pettis county, Missouri; that said notes were not paid by said company at their maturity; that prior to the institution of said suit and after the maturity of said notes as aforesaid, to wit, on the 25th day of November, A. D. 1875, said J. R. Barrett, the payee and endorser on said notes, paid off and fully satisfied said notes to the Commercial Bank of St. Louis, the owner and holder thereof at the time of said payment and satisfaction; that plaintiff, at the time of the commencement of said suit, had no title, right, interest, or claim in or to said notes or either of them, and he had none at the time of the rendition of said judgment, and he has no title, right, interest, or claim in or to said judgment now; that he instituted and prosecuted said suit in his own name and prosecuted it to final judgment for the exclusive use and benefit of said J. R. Barrett, in pursuance of an illegal and corrupt agreement between plaintiff and said Barrett; that said Barrett is the real party in interest; that said suit was so instituted and prosecuted to final judgment in the name of plaintiff, with the intent and for the purpose of unjustly, improperly, and illegally coercing money by this proceeding out of these defendants, as stockholders in said Texas and Atlantic Refrigerator Car Company, when they did not owe any money to said company, and with the intent and for the purpose of preventing these defendants, as stockholders in said company as aforesaid, from setting up certain equitable defences and equities existing between said J. R. Barrett, as president of said Texas and Atlantic Refrigerator Car Company, and these defendants, as stockholders therein, and which
19 equities, if set up in a direct suit between said Barrett and these defendants, would be a full and complete bar to any suit which said Barrett could institute against these defendants for

or on account of the payment of said notes by said Barrett to said Commercial Bank of St. Louis as aforesaid.

3. For a further defence to said pretended judgment defendants state that plaintiff obtained and procured it by fraud. Defendants set up and plead the foregoing facts as a full and complete bar to plaintiff's cause of action.

JAMES CARR AND
W. W. S. SNODDY,
Attorneys for Defendants Stevens and Mirick.

And afterwards, on the 12th day of October, 1883, it being in vacation of said court, the following further proceedings were had in said cause, to wit:

WILLIAM NICHOLS
vs. } 1727.
TEXAS & ATLANTIC REF. CAR CO. *et al.*

This day there is received by mail and filed herein a motion of plaintiff for leave to withdraw certain depositions in this case, for the reasons in said motion set forth, and on the back thereof is the following endorsement, viz: "Let the depositions be transmitted, per express, to the notary, the amendment made, and the deposition returned according to law. Oct. 11, '83. (Signed) A. Krekel, judge."

The motion filed as aforesaid is in the words and figures following, to wit:

Motion.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri.

20 WILLIAM NICHOLS, Plaintiff,

vs.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR CO., ROBERT S. STEVENS, and HENRY MIRICK, Defendants.

To the Hon. Arnold Krekel, one of the judges of said court:

William Nichols, the plaintiff in the above-entitled cause, respectfully represents that on Sept. 7th, 1883, the defendants in the above cause caused said plaintiff to appear before Chas. M. Napton, a notary public in the city of St. Louis, to give his deposition to be used on the trial of said cause; that plaintiff did so appear, and, being duly sworn, testified before said notary, and his testimony was reduced to writing; that afterwards said deponent discovered some statements therein which he desired to correct to conform to the facts; that thereupon a misunderstanding arose as to deponent's right to make said corrections before signing said deposition, and, his counsel not being then present, the said deponent, plaintiff in the cause, refused to sign said deposition in its then form, and thereupon said notary certified said deposition to this court unsigned, and the same is now

on file in the office of the clerk of this court; that since the filing thereof the matter of said misunderstanding has been properly understood and the plaintiff is desirous of making said correction and signing said deposition, and said notary is ready to permit the same to be done to properly certify said deposition accordingly.

Wherefore plaintiff prays that your honor make an order directing said deposition to be returned to said Chas. M. Napton, notary public, for the purpose of being properly signed and certified and returned to the clerk of your said court.

21 GEO. P. B. JACKSON,
Att'y for Pl'tff, Wm. Nichols.

And afterwards, at a regular stated term of said circuit court, begun and held on the third Monday, the 19th day, of November, 1883, at the place aforesaid, the following further proceedings were had in said case on said last-mentioned day, to wit:

WM. NICHOLS
vs. } 1727.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.*

This day comes the plaintiff, by his attorney, Geo. P. B. Jackson, Esq., and files his demurrer to the separate answers of defendants, Stevens and Mirick, herein, and said demurrer so filed as aforesaid is in the words and figures, to wit:

Demurrer.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri. November Term, 1883.

WILLIAM NICHOLS, Plaintiff,

vs.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS, and HENRY D. MIRICK, Defendants.

Now again comes the plaintiff and demurs to the answer of the defendants, Stevens and Mirick, filed in this cause, for the reason that said answer is inconsistent, and in the different parts thereof attempts to set up inconsistent and conflicting defenses, in that in the first paragraph thereof said defendants plead general denial, and in the second and third paragraphs thereof they plead matters of pretended avoidance.

And for further grounds of demurrer to the said second and third paragraphs of said answer plaintiff assigns the following:

22 That said parts of said answer do not state facts sufficient to constitute any defense to plaintiff's cause of action, as stated in his petition, because the matters in said answer alleged, even if

true, are fully determined and concluded by the judgment in favor of plaintiff, pleaded in said answer and in plaintiff's petition, and because the said judgment in favor of plaintiff against said Texas and Atlantic Refrigerator Car Co. is conclusive upon the defendants, Stevens and Mirick, as stockholders therein, and because said parts of said answer do not state any other or further facts sufficient to constitute any defense to plaintiff's cause of action.

GEO. P. B. JACKSON,
Att'y for Plaintiff.

And afterwards, at said last-mentioned regular stated term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said case on the 21st day of November, 1883, to wit:

WM. NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

This day come the parties, by their attorneys, the plaintiff by Geo. P. B. Jackson, Esq., and the defendants, Stevens & Mirick, by their attorney, James Carr, Esq., and the demurrer to the separate answers filed herein was argued by counsel and submitted and by the court taken under advisement.

And afterwards, at said last-mentioned regular stated term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said cause on the 22nd day of November, 1883, to wit:

23 WM. NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

This day come the defendants, by their attorney, James Carr, Esq., on whose motion leave is granted said defendants to file briefs within twenty days from this date.

And afterwards, at a regular stated term of said circuit court, begun and held on the third Monday, the 17th day, of November, 1884, at the place aforesaid, the following further proceedings were had in said case on the 24th day of November, 1884, to wit:

Demurrer Overruled.

WM. NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

Ordered by the court that the demurrer to the answer heretofore submitted be, and the same is hereby, overruled.

And afterwards, at said last-mentioned regular stated term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said cause on November 26th, 1884, to wit:

WM. NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

This day comes the plaintiff, by his attorney, Geo. P. B. Jackson, Esq., on whose motion it is ordered that plaintiff have until the first day of January, 1885, within which to file his reply to defendants' amended answer.

And afterwards, on the 26th day of December, 1884, it being in vacation of said circuit court, the following further proceedings were had in said cause, to wit:

24 WM. NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

This day there is received by mail and filed herein plaintiff's reply to the separate amended answer of defendants, Stevens and Mirick, and said reply so filed as aforesaid is in the words and figures following, to wit:

Reply.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri. In Vacation, 1884.

WILLIAM NICHOLS, Plaintiff,

v.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS, and HENRY MIRICK, Defendants.

Now again comes the plaintiff and, leave of court being had therefor, replies to the new matter contained in the separate amended answer of the defendants, Robert S. Stevens and Henry Mirick, and for said reply thereto says—

That he denies that the judgment described in the petition in this suit is only a pretended judgment, and says that the same is a *bona fide*, valid, and binding judgment, in full force and unsatisfied, except as stated in the petition.

Plaintiff admits that said judgment was recovered on two promissory notes executed by the said Texas and Atlantic Refrigerator Car Company to J. R. Barrett and by him endorsed; that said Barrett was the president of said company, and as such signed said notes; and plaintiff says that said Barrett so signed and executed said notes under direction and authority of the officers and
25 directors of said company in the regular course of business for a good and valuable consideration.

Plaintiff admits that said notes were not paid at their maturity (or at any other time) by said company, but denies that after their maturity and prior to the institution of said suit (on said notes), to wit, on Nov. 26th, 1875, or at any other time, said J. R. Barrett, as payee and endorser or otherwise, paid off and satisfied said notes or either of them or any part thereof to the Commercial Bank of St. Louis or to any one else.

Plaintiff denies that at the time of the commencement of said suit (on said notes) he had no title, right, interest, or claim in or to said notes or either of them, or that he had none at the time of the rendition of said judgment thereon, or that he has no title, right, interest, or claim in or to said judgment on said notes, but avers that at the time of commencing said suit on said notes and at the rendition of the judgment thereon he was the legal owner and holder of said notes, entitled to sue and recover judgment thereon, and that he is now and ever has been the owner of said judgment, entitled to enforce the same.

He denies he instituted or prosecuted said suit in his own name for the exclusive use and benefit of said J. R. Barrett in pursuance of an illegal and corrupt agreement between plaintiff and said J. R. Barrett. He denies that said J. R. Barrett is the real party in interest; denies that said suit was so instituted and prosecuted to final judgment in the name of plaintiff with the intent or for the purpose of unjustly, improperly, and illegally coercing money by this proceeding out of these defendants, as stockholders in said Texas and Atlantic Refrigerator Car Company or otherwise, when
26 they did not owe the same, or under any other circumstances, or with the intent or for the purpose of preventing these defendants, as stockholders in said company or otherwise, setting up certain equities and equitable defenses existing between said J. R. Barrett, as president of said company, and these defendants, as stockholders therein, or any other equities or defenses whatever.

Plaintiff denies that there *is* or ever *was* any equities existing between said Barrett and said defendants, and says that if there had been they could not have constituted any defense to said suit on said notes; and he denies the existence at any time of any supposed equities, which, if set up in a direct suit between said Barrett and these defendants, would be a full and complete bar to any suit which said Barrett could institute against these defendants for or on account of the payment of said notes by said Barrett to said Commercial Bank of St. Louis or any other account (plaintiff again denying said payment to said bank).

Plaintiff also denies that the judgment described in the petition was obtained and procured by fraud.

Plaintiff, further replying, says that the pretended statement of new matter in said answer is so vague, indefinite, and uncertain that he is unable to plead or reply thereto more specifically than he has already done herein, and he says and objects that said pretended statement of new matter is composed mainly of conclusions of law and constitutes no defense to the cause of action stated in plaintiff's petition.

And for further reply plaintiff says that the matter of the ownership of said notes sued on by plaintiff in the circuit court of Pettis county, Mo., as alleged by defendant, and the right of plaintiff to recover judgment thereon and the liability of said Texas and Atlantic Refrigerator Car Company on said notes and in said suit,
27 and all and singular the matters complained of in relation thereto by defendants in their answer were matters at issue in said suit on said notes & were in said suit duly submitted for adjudication to said circuit court of Pettis county, Mo., the same then and there being a court of the State of Missouri duly and legally constituted and having jurisdiction of the parties and of the subject-matter; and, being so at issue and submitted, all said matters and things now complained of by defendants were fully and finally determined and adjudged in said suit by said court, which said judgment and determination plaintiff now specially pleads and says that all said issues and matters are concluded and are *res adjudicata* as to said Texas and Atlantic Refrigerator Car Company and as to these defendants as stockholders therein.

Plaintiff further says that the said judgment of the circuit court of Pettis county, Mo., in favor of this plaintiff and against the said Texas and Atlantic Refrigerator Car Company still remains in full force against said company and these defendants as stockholders in privity with said company; that said judgment has never been appealed from or set aside and cannot now be impeached by these defendants in these proceedings.

And, having fully replied, the plaintiff again asks judgment as prayed in his petition.

GEO. P. B. JACKSON,
For Plaintiff.

And afterwards, at a regular stated term of said circuit court, begun and held on the third Monday, the 20th day, of April, 1885, at the place aforesaid, the following further proceedings were had in said cause on the 22d day of April, in said year, to wit:

Hearing.

WM. NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

28 This day come the parties, by their attorneys, the plaintiff by George P. B. Jackson, Esq., and the defendants by James Carr, Esq., and this case being regularly called for trial and both parties being ready, it is ordered that a jury come, to wit, George Arnhardt, F. N. Reese, L. McCubbin, John Cyrus, George Miller, William May, Thomas Gibson, Hugh Rodgers, John P. Webb, G. S. Abbington, Thomas Kendall, and A. S. Stanley, twelve good and lawful men, who were duly sworn well and truly to try the issues herein joined; thereupon evidence was heard, and, not being concluded at the hour of adjournment, it is ordered that further proceedings be postponed until to-morrow morning.

And afterwards, at said last-mentioned term of said court, the following further proceedings were had in said case, to wit, on the 23d day of April, 1885, to wit:

WM. NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

This day come again the respective parties, by their respective counsel, as on yesterday, and also come the jury; thereupon evidence was further heard and the cause argued by counsel, and the court not being ready to charge the jury as to the law in the case, it is ordered that further proceedings herein be continued until to-morrow morning.

And afterwards, on the 24th day of April, 1885, at said last-mentioned regular stated term of said court, the following further proceedings were had in said case, to wit:

WM. NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

This day come the parties, by their respective attorneys, as on yesterday, and also come the jury who were sworn herein,
29 who were charged by the court as to the law in the case, and retire to consider what verdict to return herein, and afterwards return into court the following verdict, viz:

"*Verdict.*

NICHOLS
vs.
TEXAS & ATLANTIC REF. CAR CO. *et al.* } 1727.

We, the jury, find for the plaintiff as against Henry D. Mirick in the sum of $627.41, and also in favor of plaintiff as against R. S. Stevens in the sum of $5,027.33.

L. McCUBBIN, *Foreman.*"

And afterwards, at said last-mentioned term of said court, the following further proceedings were had in said case on the 28th day of April, 1885, to wit:

Judgment.

WM. NICHOLS
vs.
TEXAS & ATLANTIC REF. CAR CO. *et al.* } 1727.

This day comes the plaintiff, by his attorney, Geo. P. B. Jackson, Esq., and it appearing that as to the defendant, The Texas & At-

lantic Refrigerator Car Co., this cause is not movable to this court from the circuit court of Pettis county, Mo., it is ordered by the court that this cause be dismissed as to said defendant, The Texas & Atlantic Refrigerator Car Co., and that plaintiff take nothing against said defendant; and now comes the plaintiff, and, by leave of the court, remits the sum of thirty dollars from the amount returned by the jury in their verdict against the defendant, Robert S. Stevens. It is therefore adjudged by the court that the plaintiff have and recover of the defendant, Robert S. Stevens, the sum of four thousand nine hundred and ninety-seven and $\frac{33}{100}$ dollars ($4,997.33), together with two-thirds of the costs incurred in this proceeding, which, by consent of the parties hereto, are taxed against said defendant; and it is further ordered that execution issue against said defendant Stevens for said judgment and costs; and it is therefore further adjudged that the plaintiff recover against *of* the defendant, Henry D. Mirick, the said sum of six hundred and twenty-seven and
30 $\frac{41}{100}$ dollars ($627.41), together with one-third of the costs incurred in this proceeding, which, by consent of the parties, are taxed against said defendant; and it is further ordered that execution issue against said defendant Mirick for said judgment and costs.

Mo. for New Trial Filed.

Thereupon come the defendants, Robert S. Stevens and Henry D. Mirick, and file a joint motion for a new trial herein.

And said remittitur so filed as aforesaid is in the words and figures following, to wit:

Remittitur.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri. April Term, 1885.

WM. NICHOLS, Pl'ff,

vs.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR CO., ROBERT S. STEVENS, and H. D. MIRICK, Def'ts.

Now comes the plaintiff and asks leave of the court to remit the sum of thirty dollars from the amount of the verdict returned by the jury against the defendant, Robert S. Stevens, and that judgment be entered againt said Robert S. Stevens in the amount of said verdict less said sum of thirty dollars so remitted.

GEO. P. B. JACKSON,
Att'y for Pl't'ff.

31 And said motion for a new trial so filed as aforesaid will be found copied on page 114 of this transcript.

And afterwards, on the 30th day of April, 1885, it being in vacation of said circuit court, the following further proceedings were had, to wit:

WM. NICHOLS
vs.
TEXAS & ATLANTIC REF. CAR CO. *et al.* } 1727.

This day there is received and filed herein the joint motion in arrest of judgment on the part of Robert S. Stevens and Henry D. Mirick.

And said motion so filed as aforesaid will be found copied on page 115 of this transcript.

And afterwards, on the 12th day of September, 1885, it being an adjourned day of said last-mentioned regular stated term of said circuit court, the following further proceedings were had in said cause, to wit:

Remittitur Set Aside & Disallowed. Judgment Set Aside.

WILLIAM NICHOLS
vs.
TEXAS & ATLANTIC REFRIGERATOR CAR CO. *et al.* } 1727.

This day come the parties, by their respective attorneys, the plaintiff by Geo. P. B. Jackson, Esq., and the defendants by James Carr, Esq. It is thereupon ordered by the court that the remittitur of $30 heretofore entered herein from the verdict rendered against the defendant Stevens be, and the same is hereby, set aside and dis-
32 allowed; and it is further ordered that the judgment heretofore entered herein on the 28th day of April last against the defendants, Robert S. Stevens and Henry D. Mirick, be, and the same is hereby, set aside and for naught held.

Judgment Against R. S. Stevens on the Verdict.

Thereupon, on motion of plaintiff's attorney, it is ordered that judgment be entered upon the verdict of the jury rendered herein. It is, therefore, considered, ordered, and adjudged, as of the 28th day of April, 1885, that the plaintiff, William Nichols, recover against the defendant, Robert S. Stevens, the said sum of five thousand and twenty-seven dollars and thirty-three cents ($5,027.33), the amount so as aforesaid by the jury assessed, together with two-thirds of the costs herein by him laid out and expended, and that he have thereof execution.

MEMO.—This judgment bears interest at the rate of six per cent. per annum from said 28th day of April last past.

Judgment Against H. P. Mirick on the Verdict.

And it is further considered, ordered, and adjudged, as of said last named date, that the plaintiff, William Nichols, recover against the defendant, Henry D. Mirick, the said sum of six hundred and twenty-seven dollars and forty-one cents ($627.41), the amount so as aforesaid by the jury assessed, together with one-third of the costs by him herein laid out and expended, and that he have thereof execution.

MEMO.—This judgment bears interest at the rate of six per cent per annum from its date.

Motion to Set Aside Verdict & for New Trial, also in Arrest of Judgment, Refiled. Motions Overruled. Bill of Exceptions Filed.

Thereupon come the defendants and by leave of court refile their motion to set aside the verdict and grant a new trial, and also the motion in arrest of judgment heretofore filed; which motions, after argument of counsel, are submitted and by the court overruled; to which judgment and ruling of the court the defendants then and there excepted and tender their bill of exceptions, which, having been examined, is signed and sealed and ordered to be filed and made a part of the record herein.

33 *Bill of Exceptions.*

In the Circuit Court of the United States for Eastern Division of the Western District of Missouri. April Term, 1885.

WILLIAM NICHOLS, Pl'ff,

vs.

TEXAS & ATLANTIC REFRIGERATOR CAR COMPANY, ROBERT S. STEVENS, and H. D. MIRICK, Def'ts.

Plaintiff's evidence.

Be it remembered that on the 22d day of April, 1885, the above-entitled cause came on for trial on the issues joined on the plaintiff's petition, the defendants' amended answer thereto, and the plaintiff's replication to said answer.

The plaintiff, to maintain the issues on his part, offered to read in evidence a duly certified copy of the record in the case wherein William Nichols was plaintiff and The Texas and Atlantic Refrigerator Car Company was defendant, in the circuit court of Pettis county, Missouri.

The defendants Stevens and Mirick objected to the reading of said copy in evidence for the following reasons:

First. Because the court has no jurisdiction over the subject-matter of this suit.

Second. Because the defendants were not parties to the judgment sued on, and said judgment was not legally admissible in evidence against them as the foundation of plaintiff's claim against them.

Third. Because J. R. Barrett was the owner of the notes upon which said judgment was recovered and president of the Texas and Atlantic Refrigerator Car Company, the maker of said notes, at the time said suit was brought on said notes, and said suit was brought by plaintiff for his, said Barrett's, benefit, — was served on him as president of the Texas & Atlantic Refrigerator Car Company,
34 and it never appeared to said suit or in any way waived the service of said summons, and the judgment was rendered by default, and was and is null and void.

Fourth. Because said record is incompetent evidence against these defendants for any purpose, except to show that plaintiff had recovered judgment against the Texas and Atlantic Refrigerator Car Company and an execution had been issued thereon and returned *nulla bona.*

The court overruled said objections and allowed said copy of said record to be read in evidence. To this ruling of the court said defendants then and there duly excepted.

Said copy of said record was then read in evidence, and is in words and figures as follows:

(Note by the clerk.—The bill of exceptions in this case was prepared in skeleton form by the attorney for defendants, and the record above referred to (being a transcript of the case of Nichols *vs.* The T. & A. Ref. Car Co., in the circuit court of Pettis county, Mo.), offered in evidence by the plaintiff at the trial, could not be found among the files or in the clerk's office, where the transcript was made, although diligent search was made for it. Counsel for the plaintiff was notified and requested to return the copy used at the trial or have another made, which he declined to do, on the ground that he had made careful search for the copy used and it could not be found, and as the defendants *was* having this transcript made and prepared the bill of exceptions it was *his* duty to supply the papers called for therein. The clerk further states he also requested counsel for defendants to supply this record, which was refused, because it was evidence offered on behalf of the plaintiff, and it was plaintiff's duty to file the record with the clerk, and, if the copy used at the trial is lost, to have another made.)

34*a* In the Supreme Court of the United States.

ROBERT S. STEVENS, Plaintiff in Error,
vs.
WILLIAM NICHOLS, Defendant in Error.

Error to the circuit court of the United States for the eastern division of the western district of Missouri.

It is hereby stipulated and agreed by the parties in the above-entitled cause that the clerk of the Supreme Court of the United States is hereby authorized and directed to print the copy of the record hereto annexed in the case wherein William Nichols was plaintiff and The Texas and Atlantic Refrigerator Car Company

was defendant, in the circuit court of Pettis county, Missouri, in this case at the place where it is called for in the bill of exceptions herein, the same as if it had been by the clerk of the court below copied in the transcript filed herein, and the same is to be
34*b* and constitute a part of the record in this cause as fully for all purposes as if it had been by said clerk copied into said transcript.

September 1, 1886.

JAMES CARR,
Att'y for Plaintiff in Error.
GEO. P. B. JACKSON,
Att'y for Wm. Nichols, Defendant in Error.

34*c* STATE OF MISSOURI, } *ss:*
County of Pettis, }

Pleas before the circuit court of Pettis county, at a term begun and holden in the city of Sedalia, county and State aforesaid, on the 3d day of January, 1876, before the Honorable William T. Wood, judge of the sixth judicial circuit of the State of Missouri.

WILLIAM NICHOLS, Plaintiff,
vs.
THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, Defendant.

Be it remembered that heretofore, to wit, on the 11th day of December, 1875, a petition was filed in the above-entitled cause in the office of the clerk of the circuit court in and for the county of Pettis in words and figures following, to wit:

In the Circuit Court of Pettis County, State of Mo.

WILLIAM NICHOLS, Plaintiff,
vs.
THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY, Defendant.

Plaintiff states that on May the 6th, 1875, the defendant was a corporation duly created and organized as such under the laws of the State of Missouri, and with power to contract and to bind itself, by note or otherwise, and plaintiff says that defendant is now such corporation.

Plaintiff further states that on May the 6th, 1875, the defendant, by its president and duly authorized agent, J. R. Barrett, made and delivered to said J. R. Barrett its certain negotiable promissory note in words and figures following, to wit:

ST. LOUIS, *May 6th*, 1875.

Three months after date we promise to pay to the order of
34*d* J. R. Barrett fifty-eight hundred dollars, for value received, payable at the Commercial Bank, St. Louis, with interest from maturity at the rate of ten per cent. per annum.

TEXAS AND ATLANTIC REFRIGERATOR
CAR COMPANY,
By J. R. BARRETT, *President.*

Which said note was by said J. R. Barrett afterwards endorsed by him and delivered to plaintiff, who is now, for a valuable consideration by him paid, the owner and holder of said note.

Plaintiff states that the full amount named in said note, $5,800, with ten per cent. interest thereon from August the 6th, 1875, is now due plaintiff from defendant, for which he asks judgment.

Plaintiff further states that defendant, a corporation duly created and organized as aforesaid, did, on May 14th, 1875, make and deliver, by its president and duly authorized agent, J. R. Barrett, to said J. R. Barrett its certain negotiable promissory note in words and figures following, viz:

ST. LOUIS, *May* 14, 1875.

Three months after date we promise to pay to the order of J. R. Barrett forty-two hundred dollars, for value received, payable at the Commercial bank, St. Louis, with interest from maturity at the rate of ten per cent. per annum.

TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY,
J. R. BARRETT, *President.*

Plaintiff states that the full amount named in said note, viz., $4,200, with ten per cent. interest thereon from August the 14, 1875, is due and unpaid plaintiff, for which he asks judgment.

PHILIPS, VEST & GANTT,
For Plaintiff.

34*e* The exhibits attached to said petition and the endorsements thereon are in words and figures following:

$5,800. ST. LOUIS, *May* 6, 1875.

Three months after date we promise to pay to the order of J. R. Barrett fifty-eight hundred dollars, for value received, payable at the Commercial Bank, St. Louis, with interest from maturity at the rate of ten per cent. per annum.

TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY,
By J. R. BARRETT, *President.*

[Written across face:] Protested for non-payment this 9th day of August, 1875. W. D. Harrison, notary public, St. Louis, Mo.

Endorsed: 13056. Texas & Atlantic Ref. Car Co. J. R. Barrett, Joel Ellis.

2ND EXHIBIT.

$4,200. ST. LOUIS, *May* 14, 1875.

Three months after date we promise to pay to the order of J. R. Barrett forty-two hundred dollars, for value received, payable at the Commercial Bank, St. Louis, with interest from maturity at the rate of ten per cent. per annum.

TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY,
By J. R. BARRETT, *President.*

Endorsed: 13088. Texas & Atlantic Ref. Car Co. Aug. 17. J. R. Barrett, Joel Ellis.

Upon said petition a summons was issued to the sheriff of Pettis county on the 11th day of December, 1875, which was returned executed on the same day.

Said summons and the return thereon are in words and figures as follows:

34*f* *Summons.*

STATE OF MISSOURI, } ss:
County of Pettis, }

The State of Missouri to the sheriff of Pettis county, Greeting:

We command you to summon the Texas & Atlantic Refrigerator Car Co. that they be and appear in our circuit court, to be held at the court-house in the city of Sedalia, in said county, on the first Monday in January next, 1876, then and there before the judge of said court to answer the petition of William Nichols, a certified copy of which said petition is hereunto annexed, and this you shall in nowise omit; and have you then and there this writ.

Witness my hand as clerk of our said court and the seal thereof. Done at office, at Sedalia, in the county aforesaid, on the 11th day of December, A. D. 1875.

[SEAL.]

J. C. WOOD, *Clerk,*
By G. T. ADAMS, *D. C.*

Sheriff's Return.

Served the within summons in Pettis county, Missouri, on the 11th day of December, 1875, upon the within-named Texas and Atlantic Refrigerator Car Company by delivering a copy thereof, together with a copy of the annexed petition, to J. R. Barrett, president of the said Texas and Atlantic Refrigerator Car Company.

L. S. MURRAY, *Sheriff,*
By S. S. HOMANS, *D. S.*

And afterwards, to wit, on the 26th day of January, 1876, the same being the 21st day of the January term of said court, the following proceedings were had of record in said cause:

34*g* WILLIAM NICHOLS

vs.

THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY.

Now at this — comes the plaintiff, by his attorney, but the defendant herein, although being legally served with process and duly notified of the commencement and nature of this action more than fifteen days before the commencement of this term of court and now here three times solemnly called, comes not, but makes default, which said default is now made final.

The court now finds from the allegations set forth in the petition that the defendant is justly indebted to the plaintiff on the first count in the petition for the sum of $4,351.66 *dollars*, and on the second count the sum of $6,025.55 *dollars*, making the total amount of $10,377.21 *dollars*, the same being founded on two promissory notes for the direct payment of money, at the rate of 10 per cent. interest per annum.

It is, therefore, considered and adjudged by the court that the plaintiff have and recover from and against the defendant the sum of ten thousand three hundred and seventy-seven dollars and twenty-one cents ($10,377.21 *dollars*), with ten per cent. interest thereon, together with his costs in this behalf laid out and expended, and that execution issue therefor.

Upon which judgment an execution was, on the 31st day of January, 1876, issued to the sheriff of Pettis county, Missouri, and upon March 7th, 1876, duly returned by said sheriff "not satisfied."

A copy of which execution, together with the sheriff's return thereon, is in words and figures as follows:

34*h* *General Execution.*

STATE OF MISSOURI, } *ss:*
County of Pettis, }

The State of Missouri to the sheriff of Pettis county, Greeting:

Whereas William Nichols, on the 26th day of January, in the year of our Lord eighteen hundred and seventy-six, at our said circuit court for said county of Pettis, recovered against the Texas and Atlantic Refrigerator Car Company the sum of ten thousand three hundred and seventy-seven dollars and twenty-one cents and also his costs, which have been taxed — the sum of six dollars and seventy-five cents:

These are, therefore, to command you that of the goods and chattels, lands and tenements, of the said Texas and Atlantic Refrigerator Car Company you cause to be made the judgment and costs aforesaid, and that you have the same before the judge of our said court on the 1st Monday in May next to satisfy said judgment and

costs, and have you then and there this writ, certifying how you have executed the same.

Witness James C. Wood, clerk of said court, with the seal thereof. Done at office, in Sedalia, in the county aforesaid, on this 31st day of January, A. D. 1876.

[SEAL.]

J. C. WOOD, *Clerk*,
By J. W. STEWART, *D. C.*

Upon which are the following endorsements:

General execution. No. 3195. Pettis circuit court. Returnable May term, 1876. William Nichols *vs.* The Texas and Atlantic Refrigerator Car Company.

34*i*	Debt	$10,377 21
	Clerk Wood	5 75
	Sheriff Murray	1 00
	Wood, execution	1 00
	Murray, levy	1 50
	Advertising	2 50
	Sheriff's com.	75
	Crft. purch.	50
	Costs	$13 00

Date of judgment, January 26, 1876. P., V. & Gantt, plaintiff's att'ys. 10% interest. "Came to hand February 1st, 1876. L. S. Murray, sheriff."

"By virtue and authority of this execution I do hereby levy upon and seize one undivided half interest in a certain ice-house as the property of the Texas and Atlantic Refrigerator Car Company, situate west of the Missouri, Kansas and Texas railway and south of Indiana St., in the city of Sedalia, county of Pettis, State of Missouri, Feb. 24, 1876.

L. S MURRAY, *Sheriff*,
By S. W. RITCHEY, *Deputy*."

"After advertising the property in the above levy, putting up at least six written notices in Sedalia township containing description of property and stating time, terms, and place of sale, I did, on Tuesday, the 7th of March, 1876, between 9 and 5 o'clock of said day, at the court-house door in Sedalia, in said county, expose to sale at public auction to the highest bidder for cash, the said property, and J. R. Barrett being the highest and best bidder for the said property, at and for the sum of twenty-five dollars ($25.00), the same was struck off and sold to him for said sum, and this execution is hereby returned with costs ($13.00) settled, and judgment credited by $12.00, per Barrett, and unsatisfied March 7th, 1876; and I return this execution not satisfied, there being no other goods, chattels, or property found belonging to the defendant on which to levy this execution.

L. S. MURRAY, *Sheriff*,
By S. W. RITCHEY, *Deputy*."

34j STATE OF MISSOURI, } ss:
County of Pettis, }

I, Benton H. Ingram, clerk of the circuit court of Pettis county, Missouri, hereby certify that the above and foregoing is a true, full, and complete transcript of the record and proceedings, as also a copy of the execution in the cause of William Nichols against the Texas and Atlantic Refrigerator Car Company as fully as the same appear on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at office, in Sedalia, Pettis county, Missouri, this 17th day of November, A. D. 1883.

[Seal Pettis County Circuit Court, Missouri.]

B. H. INGRAM, *Clerk.*

(Endorsed:) Sup. Court U. S. 1886, Oct'r term. No. 784. Robert S. Stevens, pl'ff in error, *vs.* William Nichols. Stipulation of counsel & addition to record.

[Stamped:] Office Supreme Court U. S. Filed Sept. 30, 1886. James H. McKenney, clerk.

35 *Stock Receipt, Stub of H. D. Mirick.*

The plaintiff next read in evidence receipt given by the defendant, Mirick, to the Texas and Atlantic Refrigerator Car Company, which is in words and figures as follows:

Texas and Atlantic Refrigerator Car Company of Missouri.

No. of certificate, 2.
No. of shares, 10.
Amount paid, $500.
To whom issued, H. D. Mirick.
Residence, Sedalia.
Date, August 1st, 1874.
Received certificate referred to above this 11 day of Aug., 1874.

H. D. MIRICK.

The plaintiff next read in evidence the following subscription paper, which is in words and figures as follows:

Subscription Paper.

We, the undersigned, hereby subscribe the number of shares set opposite our names in the Texas and Atlantic Refrigerator Car Company, and obligate ourselves to pay therefor according to the by-laws or resolutions of the board of directors of said company.

Witness our hands this — day of July, 1873.

Name.	No of shares at $100 each.
R. S. Stevens	Fifty shares (50)
J. R. Barrett	250 shares
F. L. Rankin	100 "
F. A. Hyatt	100 "
W. P. Robinson	100 "

The plaintiff next read in evidence from the stub book of the Texas and Atlantic Refrigerator Car Company containing receipts given by stockholders in said company for certificates of stock therein, when the certificates had been filled and delivered to the
36 stockholder, which is in words and figures as follows:

Stock Stub of R. S. Stevens.

Texas and Atlantic Refrigerator Car Company of Missouri.

No. of certificate, 8.
No. of shares, twenty.
Amount paid, $1,000.00.
To whom issued, R. S. Stevens.
Residence, Sedalia, Mo.
Date, Aug't 1, '74.
Received certificate referred to above this — day of ——, 187–.
—— ——.

This was all the evidence introduced by the plaintiff.

Thereupon the defendants, Stevens and Mirick, requested the court to give the following instructions to the jury:

Demurrer to Evidence.

The defendants demur to the plaintiff's evidence and ask the court to instruct the jury that the same is insufficient in law to base a verdict for the plaintiff, and they will find for the defendants.

Overruled.

The court refused to give said instructions; to which refusal to give said instruction said defendants then and there duly excepted.

Defendants' Evidence.

The defendants, to maintain the issues on their part, read in evidence the deposition of William Nichols, the plaintiff herein, which is in words and figures as follows:

Deposition of Wm. Nichols, Taken on the 7th Day of September, 1883, on the Part of the Defendants.

WILLIAM NICHOLS, of lawful age, being produced, cautioned, sworn, and examined on the part of the defendants, deposeth and saith:

37 My name is William Nichols. I reside in the city of St. Louis. I am of lawful age; over 21. I am the plaintiff in this case. I know J. R. Barrett, of Sedalia. On the 6th day of May, 1875, and for a long time since then he was president of the Texas and Atlantic Refrigerator Car Co.—that is, I know he was president of the Co. I do not recall the date when he was nor for what years.

He may be yet, for all I know. On May 6th, 1875, and during the whole of that year I was cashier of the Commercial Bank of St. Louis. I do not know what year I ceased to be cashier. I am president of it now. I was elected president the year Lewis died—whatever year that was.

Q. State if you were ever the owner of two notes executed by the Texas & Atlantic Refrigerator Car Co.—executed by J. R. Barrett, its president—one dated May 6th, 1875, to J. R. Barrett and endorsed in blank by him and Joel Ellis, and the other note executed by the same to the same, dated May 14th, 1875, payable 3 months after date, for $4,200 and endorsed by J. R. Barrett & Joel Ellis. The first note was for $5,800, payable 3 months after date.

Obj. to by Mr. Jackson as irrelevant & immaterial and because if the notes described are intended to be the ones upon which judgment was obtained against the above-named Co., then the question of the ownership has been already adjudicated. (See note by notary at end of the deposition.)

A. I don't know. I had a heap of notes. I don't know whether I owned them or not. I couldn't tell till I saw them.

Q. Did you ever own notes of the kind above described or any other kind?

Objected to for the same reason as above.

A. Yes; I have had notes of the refrigerator Co.

Q. How did you become the owner of said notes?

A. Buying them.

Q. From whom did you buy them?

38 A. The refrigerator company.

Q. Please state from what agent or officer of the company.

A. I think Mr. Barrett attended to the business.

Q. Who was Joel Ellis, the endorser on these notes?

A. All I know about him was that that was his name & he lived in Chicago.

Q. Were you the owner of these notes when they respectively fell due?

A. Which notes?

Q. The notes we are talking about.

A. I couldn't tell about that without looking.

Q. You could tell by looking it up, couldn't you?

A. Yes.

Q. How long will it take you to look it up? It is of importance to know these things.

A. I don't know how long it would take.

Q. The second note was never protested. Will you state why it was not?

A. I don't know that it was not & do not know why it was not.

Q. When did you become the owner of these notes?

A. I don't remember the exact date. I would not undertake to fix any date at all.

Q. Can you tell how you became the owner of these notes?

Objected to.

A. I bought all the notes I ever had in my life.
Q. Bought from whom?
A. I bought these from the company.
Q. State where J. R. Barrett lived at the time these notes fell due.
A. Sedalia.
39 Q. Were these notes ever paid by any person?

Objected to, same reason as above.

A. I don't know which notes you allude to. The company had a great many notes out, and I can't tell whether these particular notes were paid or not.

Q. Were the notes upon which this suit is based ever paid by any person; &, if so, by whom?

A. If I could see the notes I could tell. My recollection is I had as high as $40,000 of these notes at one time. I never keep a memorandum of anything, and have no memorandum about the matter.

Q. Were these notes secured by a deed of trust dated May 31st, 1875, executed by the Texas & Atlantic Refrigerator Car Co. to W. R. Johnson, as trustee, on certain property in Denison, Grayson Co., Texas?

A. I don't remember; I know I did have some notes so secured, & we went down there & sold out that stuff, but I can't remember what notes they were.

Q. State whom you mean by "we," who went down there.

A. I mean myself and the trustee, Johnson; I took one of my daughters with me; I think Barrett was there.

Q. Where did W. R. Johnson live then?

A. Here in St. Louis; I think he lives in Madison parish, La., now—Madison or Carroll parish, I don't know which; I heard he lived there.

Q. Who bought in the property at that sale?
A. I did.
Q. How much was the property worth then?
A. I don't know.
Q. When did the sale take place?
A. About the middle of the afternoon, as I recollect.
Q. How many persons were present & who were they?
40 A. I don't recollect.
Q. About how many were present?

A. I don't know. I should think there were over one hundred and fifty present; I think there were more than ten and not over 150.

Q. Do you remember any one there except yourself, Johnson, and Barrett?

A. They were all strangers to me; I never was there before.
Q. Do you remember those three there?
A. Yes; they were there, as I recollect.

Q. Did any except yourself bid on the property?

A. I don't remember.

Q. What property was sold there?

A. A piece of land and an old slaughter-house. I sold the land since for $150.00; I know I bid it in for more than that.

Q. Did you have another deed of trust made by the Texas & Atlantic Refrigerator Car Co,, dated on Sept. 1, 1875, to W. R. Johnson, on one steam-engine and boiler, one cooling apparatus & fixtures, two iron tallow tanks, one large iron tallow vault, together with the tools & fixtures then in & belonging to the slaughter-house & yard in Denison, Texas, described in the first deed of trust, and also fifty cars marked "Texas & Atlantic Refrigerator Car Company," and numbered from 6001 to 6050, inclusive, to secure the same notes?

A. I reckon I must have had the deed of trust if I sold these things out; if I sold them I had a deed of trust on them. I wouldn't go all the way to Texas to sell property I didn't have a deed of trust on.

Q. How many were present at the sale of personal property sold under the second deed of trust?

41 A. I don't know; if it was all sold at the same time I was there, but I don't know whether it was or not. I may have sent the trustee there to make the sale.

Q. Can you state whether you were present at the sale of personal property or not?

A. I would not undertake to say.

Q. Was this property bid in by you or by some one for you?

A. I can't state. I was there once only. If the personal property was sold at the same time as the real estate I was there, and my recollection is I bought everthing they put up.

Q. Did any one bid on the property besides yourself?

A. I don't think any of them bid more than I did; that's my recollection; I don't recollect whether others bid or not. I was free and open; anybody could bid that wanted to. I don't recollect what the personal property was bid in at.

Q. Were the refrigerator cars present at the time of the sale?

A. All of them?

Q. Yes, sir.

A. I don't know. It would have been pretty hard to get them all there from the railroad. I think I can tell you what you want to get at. If you want to know whether there was any fraud or concealment about it I will say I would have been glad for some one else to have bid at the sale. It was all open and above-board.

Q. If these cars were not all then present how many were there?

A. I don't know. You mean there on the track, don't you?

Q. Yes.

A. Well, I don't know how many, nor can I tell about how many. I cannot approximate as to whether there were one or 10 or 25.

Q. What did you do with those cars after you bought them?

A. My recollection is I leased them awhile to the Missouri, Kansas & Texas R'y, and afterwards sold them to that Co.

42 Q. How long & for what amount did you lease them?

A. I don't know; it would be guess-work; I think it was for 1½ cents per mile, but that is only a guess.

Q. When did you sell these cars?

A. I don't know; I can't tell what year it was.

Q. Was it in 1879 or 1880?

A. I don't know; it was after I bought them; it was while William Bond was receiver of the M., K. & T. R'y.

Q. At what price did you sell them?

A. I don't know. I know there were $30,000 due on them to the car company that made them; the company had a title to them until they were paid for. I know I sold them for enough to the M., K. & T. R'y to pay the company that made them the $30,000 due on them, which was paid, but whether I got any more or not I am unable to say. The Commercial Bank collected the money from the M., K. & T. R'y & paid it to the Springfield Car Co., that had a lien on them to that amount. I couldn't tell you whether I got a cent from them myself or not.

Q. I want you to refresh your memory from any source you can and then state what amount you got on the sale of those cars.

A. When do you want me to let you know?

Q. I will wait on you till to-morrow if you say so.

A. My impression is that I won't know anything more to-morrow about it than I do to-day. I don't know of any way by which I can refresh my memory about it. If I was to be hung for it I couldn't tell.

Q. The fixtures in the slaughter-house mentioned in this second deed of trust—what did you do with them?

A. My recollection is that they were sold for old iron, most of them. I think an engine there was sold to somebody, but I don't recollect much about that?

43 Q. When, to whom, and for what amount did you sell them?

A. I don't know.

Q. Have you no recollection at all about it?

A. I think an engine was sold to somebody and the most of it sold for old iron; I could not tell you anything more about it.

Q. Did the Commercial Bank of St. Louis ever own the notes in question?

A. They owned some of the notes of the Refrigerator Car Co. I don't know whether they ever owned those notes or not; I could tell by looking.

Q. How long will it take you to look?

A. As soon as I get time. I can't do it to-day, and I'm going fishing to-night.

Q. Did you authorize suit to be brought on these notes; and, if so, by whom?

A. Phillips & Vest, I think, was the firm at the time.

Q. Have these notes ever been paid by any one; and, if so, by whom?

A. If I could see the notes, then I could tell all about it.

Q. Can't you tell whether they have ever been paid without seeing the notes?

A. I can't tell without I'd see them.

Q. Has J. R. Barrett any interest in this suit, or is this suit prosecuted in your name for his use and benefit?

A. Yes.

Q. Which do you mean?

A. It is prosecuted for his use and benefit.

Q. Have you any interest in this suit?

A. I can tell you exactly how the case stands. Mr. Barrett and the Refrigerator Car Co. both owed the bank and myself a
44 large amount of money. It was the company's debt and Barrett was endorser for it. I was anxious to get it paid, and in order to get the money I agreed to prosecute this suit against the stockholders of the refrigerator crowd—the car Co.—they are all the same thing. I agreed with Mr. Barrett to do this. Mr. Barrett mortgaged his property and paid us the debt due.

Q. When was it that Mr. Barrett paid this debt?

A. I can't say when.

Q. Was the debt paid to you or to the bank?

A. To both of us. He paid all the debts of the car Co. and it cost him a good deal of money; as I understand it he paid the entire debts of the car Co. He mortgaged his farm in Pettis county, Mo., to the Northwestern Mutual Life Insurance Company of Milwaukee for $35,000 in the fall of 1875, and with the money realized paid off all the debts of the car company, including these notes. As far as I know he paid the entire indebtedness of the company. This payment was before the commencement of the suit against the Texas & Atlantic Refrigerator Car Company.

Q. Did you get some bonds of the city of Denison, Texas, which had been issued to the Texas & Atlantic Refrigerator Car Co. as collateral security to the notes in question in 1875, some time prior to the settlement between you and J. R. Barrett? If so, state the amount, when it was, and how much was realized on said bonds, either by you or Mr. Barrett.

A. I had in my possession bonds issued by the city of Denison and held them as security for some debt of the car Co.; don't remember what it was. I never realized a cent on them and I don't think Mr. Barrett did.

Q. Did you turn those bonds over to Mr. Barrett?

A. Yes, sir; I think before the settlement.

45 Q. Did Edward Perry get out an injunction to restrain the sale of the property described in the two deeds of trust you have testified about, after it had been advertised for sale under the deeds of trust; and, if so, upon what promise or condition was said injunction dismissed by said Perry?

A. I don't remember.

Q. Was the buildings in Denison, on the property described in the first deed of trust, insured; if so, was it burnt down after the taking of the deed of trust and the insurance money collected; if so, by whom, from whom, and what amount?

A. They were insured, and were burnt after taking the first deed of trust. After the trustee's sale some of the insurance money was collected. I have forgotten what the amount was; between $3,300 and $4,300, to the best of my recollection. The insurance money was collected from Delafield & Snow, of this city.

Q. Could you specify how soon after the sale?

A. No, sir.

Q. Will you please specify the amount of the bonds of the city of Denison which were in your hands as collateral security?

A. I can't state positively; I think it was either $8,000 or $10,000.

Q. Did you or your bank ever have any mortgage or deed of trust on some property of the Texas & Atlantic Refrigerator Car Company, in Chicago?

A. I don't think they ever did; I don't remember of any.

Q. Did the car company ever give you any other security besides the two deeds of trust spoken of and the Denison city bonds?

A. I don't remember of their giving us anything else.

Q. Did you ever realize any money from any other source than the two deeds of trust, the insurance money, and the money paid you by J. R. Barrett?

46 A. I don't remember of any.

Q. Did J. R. Barrett realize any money belonging to the company in any way?

A. I don't know.

Q. Did he ever tell you of having realized any?

A. Not that I remember of.

Q. Was it J. R. Barrett or yourself that negotiated the sale of the refrigerator cars to the M., K. & T. R'way Co.?

A. I don't know; I think I made the sale and he helped me; I know I closed up the sale; I know I had to make a transfer of the cars as they stood in my name.

Q. Has J. R. Barrett had the control of the original suit brought in your name against the Texas & Atlantic Refrigerator Car Company; also the motion to issue execution on the judgment rendered in said suit against the defendants Stevens and Mirick, in the circuit court of Pettis Co., as stockholders in the Texas & Atlantic Refrigerator Car Company, and has he the control of the present suit?

A. Mr. Barrett has no more control over that case to-day than you have, unless I had a mind to let him.

Q. Have you let him control these suits?

A. Yes; Mr. Barrett has controlled them in a measure and, at the same time, if those people would come to me and offer a fair settlement I would settle without consulting Mr. Barrett.

Q. In the summer of 1876, some time in the month of June, in a conversation between you and defendant Stevens, at the Commercial Bank, in St. Louis, did you say that you had no control in the matter nor any real interest in the suit; it was all with Barrett, and you must see him before you could say anything about the suit?

A. No.

Q. In a second conversation between you and defendant
47 Stevens, in the Commercial Bank of St. Louis, about the time

of the sitting of the Democratic national convention, June, 1876, in this city, did you say, I have seen Barrett, who was soured with everybody, had lost money, and would consent to nothing except payment of the full amount claimed, so the suit must go on?

A. I stated to him some time—the time he offered to pay me a thousand dollars—that his statement and Mr. Barrett's were so different in regard to the facts that I couldn't do anything in the matter. I was totally unable to tell who was right and who wrong. I don't think I used the words quoted in your question.

Q. In a conversation between you & the defendant Stevens early in April, 1883, at Eureka Springs, in Arkansas, in answer to this question, put to you by said Stevens, "Why have you brought suit again in that Barrett matter?" and you answered, "Has he," meaning Barrett, "brought another suit?" and Stevens replied, "Yes." Did this conversation occur between you & Stevens?

A. No.

Q. The next day, at the same place, did this conversation occur between you and the defendant Stevens? "Did you not know," said Stevens, "that suit was again commenced?" and you gave no direct answer, but replied that there were some things we could not talk about.

A. I'll tell you my recollection. We were at the hotel together. He said he was going to St. Louis, & that that suit of ours was coming up at Jefferson City the next day, and he had to be there. He said, "Didn't you know it was coming up?" and I said, "No; that I had been away a long time and I didn't know anything about it." He had asked me if I did not know it was coming up.

Cross-examined by G. P. B. JACKSON, Esq.:

48 The witness, in answer to questions, continued:

I suppose the Denison City bonds were turned back to Barrett, as president of the car Co., although I don't know as I got them from him in that capacity. As to these debts due me and the bank the Refrigerator Car Co. was the principal—the maker of the notes—and Barrett was an endorser on them as a surety for their payment. At the time of the settlement with Barrett the company had nothing that I know of out of which we could make anything. The money market at that ime was very close; money was hard to get. Mr. Barrett had to pay 10 per cent. for the money he had to get. We knew at the time that Mr. Barret did not have the money to pay the debts, but had to borrow it. I think such is the fact. I am sure the company didn't have any money. It was a part of the agreement of the settlement that Mr. Barrett was to mortgage his farm to get the money & then we were to go on and bring this suit—that is, in consideration of his doing this to expedite the settlement, then I was to prosecute the suit. I don't think the notes sued on were ever cancelled in any manner. I sent the notes to Phillips & Vest to have suit brought on them, and at the same time I had received from Mr. Barrett the amount of the notes in cash. I gave Mr. Barrett my due bill for $10,000 for the amount represented

by the notes which I did not surrender, and those notes which I sent to Phillips & Vest for suit would have been cancelled by reason of the receipt of that amount of money had it not been for the contract that I was to prosecute the suit. Barrett still holds my due bill. I did this for the purpose of aiding Mr. Barrett as a friend of his in getting his money out of the notes. It was not done for the purpose of covering up anything improper
49 in any transactions we had had.

And further deponent saith not.

The above and foregoing is all the testimony of William Nichols, who refuses to subscribe his name thereto.

[SEAL.] C. M. NAPTON,
Notary Public.

NOTE.—Referring to page 2 of William Nichols' deposition, the objection there made to the question was by agreement considered as made to all subsequent questions on the same subject or relating to the same subject-matter, and the writing out of said objection to any such questions was waived and considered as having been made, though not appearing in the deposition itself. This agreement was made by the attorneys of the respective parties to save time. To this I certify.

[SEAL.] C. M. NAPTON,
Notary Public.

Be it remembered that on this 15th day of October, 1883, personally appeared before me the above-named William Nichols, who stated that the foregoing deposition was incorrect as to certain matters, and that his recollection as to certain matters therein contained had been refreshed, and, upon making the following corrections thereto, he signed the same by his signature hereunto annexed; said alterations and corrections are as follows, to wit:

In reference to the matters stated on page six (pages 39 & 40 of this transcript) of said deposition, witness states now that his recollection as to whether he was personally present at the sale is very much confused, and he relies upon the statement of Mr. Barrett to him that he was there.

On page 15 (page 45 of this transcript) of said deposition the witness states that he did have security on some real estate in Chicago belonging to either Mr. Barrett or the car Co., he does not remember which, which statement also applies to his answers on page 16 (pages 45 & 46 this transcript), and with the above corrections made said witness hereunto subscribes his name to said deposition by attaching it to this paper.

W. NICHOLS.

I, C. M. Napton, being duly sworn, state that the said William Nichols subscribed the above and foregoing paper on the 15th day of October, 1883, and I further state that I make this affidavit in lieu of a notarial certificate, owing to the fact that my notarial commission expired on the 14th day of September, 1883.

C. M. NAPTON.

50 Sworn to and subscribed before me this 15th day of October, A. D. 1883.

[SEAL.] M. RENSHAW,
Notary Public.

The defendants next read in evidence the deposition of J. R. Barrett, which is in words and figures as follows:

Deposition of J. R. Barrett, Taken on the 19th day of November, 1883, at the City of Sedalia, before Clifford Jackson, a Notary Public, on the Part of the Defendants.

J. R. BARRETT, of lawful age, being produced, sworn, and examined on the part of the defendants, deposeth and saith:

Ny name is J. R. Barrett; age, 49; residence, Sedalia, Mo.; occupation, farmer. I was the first and only president of the Texas and Atlantic Refrigerator Car Co. The company was organized in the month of July, 1873. My active duties as president and the active business of the company ceased a little before the sale of property of the company at Denison, in the year 1875, under a deed of trust. We quit slaughtering beef before the sale. The names of the stockholders at the time of the organization were T. L. Rankin, 100 shares; J. R. Barrett, 250 shares; F. A. Hyatt, 100 shares; W. P. Robinson, 100 shares; R. S. Stevens, 50 shares. These are the shareholders who signed the articles of incorporation, which are dated July 23d, 1873, and who also signed the original subscriptions of stock in the amounts above named. The others who became stockholders afterwards were Levi Parsons, 50 shares; H. D. Mirick, 10 shares; Angel Matherson, 10 shares; Joel Ellis, 250 shares; J. V. Thurston, 150 shares; William W. Wicks, 30 shares; Ed. Perry, 10 shares; H. B. Henson, 5 shares. The amount paid in by the above-named stockholders is as follows:

51

T. L. Rankin	paid	nothing.
J. R. Barrett	"	25,000.00.
F. A. Hyatt	paid	3,750.00.
W. P. Robinson	"	nothing.
R. S. Stevens	"	1,000.00.
Levi Parsons	"	5,000.00.
H. D. Mirick	"	500.00.
Angel Matherson	"	500.00.
Joel Ellis	"	25,000.00.
J. V. Thurston	"	7,500.00.
William W. Wicks	"	1,500.00.
Ed. Perry	"	500.00.
H. B. Henson	"	500.00.

The following persons transferred stock to the following persons:

J. R. Barrett to Montgomery & Thompson, 5 shares on the — day of ——, 18—.

J. R. Barrett to E. S. Barrett, 1 share on the — day of ——, 18—

J. R. Barrett to Alfred Avery, 1 share on the — day of ——, 18—.

The above transfers were made prior to October 23, 1875, unless, perhaps, that of E. S. Barrett.

The above amounts were paid in cash, except $12,500, which was paid by Joel Ellis in real estate in Cook county, Illinois, in or near Chicago. This real estate was conveyed to A. D. Jaynes, as trustee for the Texas and Atlantic Refrigerator Car Company. I don't know where the deed is. I thought it was among the papers of the company, but upon examination I don't find it. It conveyed an undivided one-third part of the north half of the north half of the north half of the northeast quarter of section 28, in township 38 north, of range 14 east, of the 3d principal meridian, in Cook
52 county, Illinois, that lies east of the Chicago, Rock Island and Pacific railroad line, containing 18 acres of land. William Nichols was not a stockholder in the T. & A. R. C. Co. I tried to get him to take stock, but he never agreed to take any; he never promised to take any stock. I, as the president of the T. & A. R. C. Co., executed two notes to myself as follows: One dated St. Louis, May 6, 1875, for $5,800.00, payable three months after date at the Commercial Bank, St. Louis, and endorsed in blank J. R. Barrett, Joel Ellis; marked "Protested for non-payment this 9th day of August, 1875. W. D. Harrison, notary public, St. Louis, Mo."—and the other note dated St. Louis, May 14, 1875, for $4,200.00, payable three months after date at the Commercial Bank, St. Louis, endorsed J. R. Barrett, Joel Ellis, not marked protested, both notes bearing interest from maturity at 10 per cent. per annum. These are the notes upon which judgment was rendered on the 26th day of January, 1876, by the circuit court of Pettis county, Missouri, in favor of plaintiff and against the T. & A. R. C. Co. The Joel Ellis endorser on these notes is the same Joel Ellis who was a stockholder in the T. & A. R. C. Co. I negotiated these notes, at or near the date of their execution, to the Commercial Bank for the benefit of the T. & A. R. C. Co. They were not in any way, shape, or form for my individual benefit. I don't know whether they were negotiated the same day or on different days. They were not paid at maturity; they were not paid at all; I did not pay them; no one else ever paid them. I don't know why the second note was not protested; I was not the holder of it. The bank got after me to pay the indebtedness. I was endorser on the notes and told them, or Nichols, who was then the cashier of the bank, that if he, Nichols, himself would give me his note for the amount of these two notes that I would raise money to liquidate the balance of
53 the indebtedness and loan him the amount of these two notes, and he said he would do it. I loaned him $10,000.00 on his note and took up the balance of the notes that the T. & A. R. C. Co. owed the bank above these two notes. The amount owing to the bank and Nichols by the T. & A. R. C. Co. was $22,500.00, without interest—*i. e.*, the face of the notes. They were all secured by the deed of trust on the Denison property, and one of them was also secured by deed of trust on Chicago property—*i. e.*, the property conveyed to the Co. by Joel Ellis—that is, the note to Wm. Nichols for $2,500.00, dated May 22, 1875. This note was secured by both deeds

of trust. The deed of trust on the Chicago property secured the following debts, to wit: The North Granville National Bank of N. Y., $5,000.00, bill of exchange at three months from April 9, 1875; the Cent. Mo. B'k'g & S'v'gs Ass'n of Sedalia, note for $1,500.00, dated April 20, 1875, due in 60 days; note to Wm. Nichols, $2,500.00, dated May 22, 1875, due in one day; bill of ex. to First Nat'l Bank of Sedalia, $2,500.00, May 17, 1875; bill of ex. to J. C. Thompson, $2,500.00, May 17, 1875, at three months. This deed of trust was executed by A. D. Jaynes, trustee of T. & A. R. C. Co., and said company to A. S. Osgood, trustee, on June 1, 1875, recorded June 3, 1875, in Book 462, p. 405, of records of Cook Co., Ill. In the deed of trust on the Denison property the following debts were secured, to wit: Bill of ex., Apr. 25, 1875, $5,000.00, at three months, to Commercial Bank of St. Louis; note to same bank, $5,800.00, dated May 6, 1875, due 3 months after date; also note to same bank for $4,200.00, dated May 14, '75, due in three months; also note to same bank for $5,000.00, dated May 20, 1875, due in three months, and a note to Wm. Nichols for $2,500.00, dated May 22, 1875, due one day after date.

54 This deed of trust was executed by the T. & A. R. C. Co. to W. R. Johnston, trustee, on May 31, 1875, and recorded June 5, 1875, in Grayson Co., Texas, in clerk's office, Book C, p. 101. On September 1st, 1875, the T. & A. R. C. Co., by its president, J. R. Barrett, executed a deed of trust to W. R. Johnson, trustee, to secure the same bill of exchange & notes described in the deed of trust on the Denison property, on the following personal property, to wit: One steam-engine and boiler & one cooling apparatus & fixtures, two iron tallow tanks, one large iron tallow vat, together with all the tools & fixtures now in and belonging to the slaughter-house & yards in the town of Denison, Texas, all of said personal property being described in a deed of trust executed, on the 31st day of May, 1875, by the T. & A. R. C. Co. to the Commercial Bank of St. Louis, Mo., & William Nichols, in Record Book C, pages 101 to 104; also fifty cars, marked "Texas and Atlantic Refrigerator Car Company," numbered from 6001 to 6050, inclusive. I now hold Wm. Nichols' note for $10,000, dated St. Louis, Mo., Dec. 15, 1875, due — after date. For value received I promise to pay to J. R. Barrett $10,000 at the Commercial Bank of St. Louis. (Signed) William Nichols. The money I used in this transaction I borrowed from the Northwestern Mutual Life Insurance Company, Milwaukee. I borrowed it in my own name—mortgaged my farm for it. The notes upon which the judgment was rendered were given to the Commercial Bank of St. Louis. The reason why I loaned pl't'ff the money, I was security on the notes and they could collect them easier than I. I thought it was the easiest way to collect them.

—. Did plaintiff take up these notes from the bank with the money which you loaned him?

55 —. I don't know. I suppose pl't'ff bought these notes from the bank. I think plaintiff was cashier of the bank at the time these notes matured. At the time the suit was brought on these notes I don't know whether the bank owned or had any interest in these notes. I suppose at the time suit was brought on

them that Mr. Nichols owned them. He brought the suit, and from the contract or understanding I had with him I conclude he owned them.

Question. About what date were these notes taken up by the plaintiff?

Ans. I don't know.

—. What was the date of your borrowing the money from the Northwestern Mutual Benefit Life Ins. Co.?

Answer. I don't remember exactly; I think it was in January; it might have been in December that I got the money; the deed was dated December 2nd, 1875, and was recorded December 16th, 1875, and it was some little time after that I got the money.

Q. Did you get the notes from Nichols & deliver them to Philips and Vest to bring suit on, or did he send them to you for that purpose?

—. I don't remember; my impression is that he sent them to Philips and Vest.

Q. Did you employ Philips & Vest to bring suit on these notes?

—. I don't remember, but if I did I employed them for Nichols.

Q. Have they been paid any fee for bringing these suits; &, if so, by whom?

Ans. I never paid them any fee. I don't know whether Nichols has paid them or not or whether they have ever been paid any.

Q. Have you ever agreed to pay them any fee for attending to these suits?

Ans. No, sir.

Q. Has the plaintiff ever agreed to pay them any fee for this?

Ans. I don't know.

Q. Is the plaintiff prosecuting this suit for your use and benefit?

Ans. I suppose he is; that was the agreement.

Q. If anything should be recovered in this case are you to
56 pay the plaintiff for his trouble, or any part of the fruits of the judgment?

Answer. There is no contract — pay him anything for his trouble or to let him have any part of the fruits of the judgment. I hold his note for $10,000 and am endorser on the notes he sued on for the same amount, and he has $10,000 of my money.

Q. Was the suit brought on these notes in pl't'ff's name, then, the better to enable you to collect the money which they called for off the defendants?

Answer. The suit was brought not only to collect off the defendants as well as off all other stockholders.

Q. If the costs should be adjudged against the plaintiff by the agreement between him & you is he or you to pay them?

—. Nothing was said about the costs.

Q. Have you given directions to Philips & Vest, in regard to how the suit should be conducted?

Answer. I have not.

Q. Who employed Geo. P. B. Jackson to conduct the present suit?

Ans. Col. Vest told me that he had left it with Mr. Jackson.

Q. Have you consulted with and taken the advice of Mr. Jackson in regard to the manner of prosecuting this suit?

Ans. I have talked with him and he has asked me a great many questions about the case. He has asked me all about the history of the case & I have given it to him, & he has taken his own course.

Q. Were you at Denison on the 13th day of November, 1875, when the slaughter-house fixtures & personal property described in the two deeds of trust heretofore spoken of were sold?

Ans. I was.

Q. Was the plaintiff there?

Ans. I could not say whether he was there or not. He was there at one time. The first time the property was advertised the sale did not take place, but whether he was there the 1st or second time I couldn't say. I remember going along with him from Denison to Sherman. He consulted attorneys at Sherman in regard to
57 an injunction that Ed. Perry had sued out to restrain the sale. The sale did not come off; the property was readvertised and sold on the 13th day of November, 1875.

Q. Was the plaintiff present at the sale on the 13th day of November, 1875?

Ans. He was there on one of the two occasions; I can't say which.

—. What is your best impression?

Ans. Am not positive; I think it was the first time.

Q. Did you bid in the property at the sale?

Ans. My impression is his att'y bought it in. I did not buy it in. His attorney was there from Sherman.

Q. What was the attorney's name?

Ans. I knew the attorneys name then, but have forgotten it now.

Q. About how many persons were present at the sale?

Ans. I think there were several. It was at the "Alamo House;" that was the largest hotel there, & Denison was then an active, thriving place.

Q. Did you bid on the property?

Ans. I don't think I did.

Q. Did you give instructions to the attorney to bid on it?

Ans. I don't think I did; if I did it was by the instructions of Mr. Nichols.

Q. Did any person bid on the property at the sale except the attorney?

Ans. It seems to me there was, but I am not positive.

Q. Was all the property bid in in Nichols' name?

Ans. Yes, sir.

Q. Where were the refrigerator cars at the time of the sale?

Ans. Some were at Denison & the balance on the road somewhere.

Q. About how many were at Denison?

Ans. I saw, I suppose, about one-half dozen or more. I am not positive how many.

Q. How long had the refrigerator cars been in use at the
58 time the sale came off?

Answer. I think about two years.

Question. How much had they cost apiece?

—. Between $1,300 and $1,400 apiece; about $1,400.

Q. Did you take charge of the cars & use them or rent them; if so, to whom?

Ans. The M., K. & T. R. R. used some of them & paid mileage on those they used after the sale. I can't say how much the mileage was, but it was not enough to pay the interest on the indebtedness on the cars.

Q. How much was the indebtedness on the cars at the time of the sale?

Ans. $28,000 or over, to the best of my recollection.

Q. Were you present at the sale of the property in Chicago?

—. I was not.

Q. When was that property sold & to whom & for what amount?

Ans. The deed says from Osgood to Wm. Nichols for $5,000, on June 18th, 1877.

Q. Do you rememember what the property at Denison sold for? If so, state.

Ans. Yes, sir; the real estate, $2,000; personal property & machinery, $1,000; company's interest in cars, $500; the costs of sale were $225.

Q. What were the costs of the sale of the property in Chicago?

Ans. I was not there. I don't know.

Q. Has the Chicago property been sold by the plaintiff?

Ans. The title still stands in Nichols' name on the records.

Q. Do you know the name of the purchasers of the property & fixtures at Denison? If so, state their names & where they reside.

Ans. Wm. Nichols, St. Louis, Mo.

Q. To whom did he sell, if he has sold?

Ans. He sold the real estate to a party whose name I have forgotten for $150; the house & fixtures were burned; the cars he
59 sold to the M., K. & T. for $30,000, on five years' time, payable $600 per month and interest at the rate of 7 % per annum on the deferred payments. The date of this sale I do not recollect; it can be ascertained in the auditor's office of the, M. K. & T. railroad.

Q. Please state the particulars in regard to the sale of the cars to the M., K. & T. R. R. Co.

Ans. Mr. Nichols sold the cars to the M., K. & T. R. R. Co., and they were to pay $30,000 to the Wasson Man'f'g Co., payable 600 per month until the whole amount was paid, with interest on the deferred payments at 7 per cent. per annum. At the time of the sale of the cars to the M., K. & T. R. R. Co. there was due on the cars to the Wasson Man'f'g Company about $22,000; the difference between $28,000 indebtedness and the twenty-two thousand dollars indebtedness had been paid in the interval between the Nichols purchase & the Nichols sale. It had either been paid by myself or Mr. Nichols. I do not remember which.

Q. Who got the difference between the amount the cars were sold for to the M., K. & T. and the balance due the Wasson Man'f'g Co.?

Ans. I did.

Q. By whom was it paid to you?

Ans. I got it from the Agawam Bank. I think the Wasson Man'f'g Company transferred their lien on the cars to the Agawan Bank and took the obligations of the M., K. & T. for $30,000. The bank then loaned me about $8,000 & took my note for the amount loaned, and when the M., K. & T. paid the full amount of the purchase-money the Agawam Bank returned me my note. I have the note now at home.

Q. Has any other money been paid you from the sale of the property belonging to the T. &. A. R. C. Co.?

Ans. Yes.

Q. By whom, when, on what account, and how much?

60 Ans. I got the insurance on the slaughter-house, which burned down, $4,400 from Nichols, and there were some expenses in procuring this amount—att'y's fee, &c.

Q. Was there any other money paid you from any other source?

Ans. No; I don't remember any.

Q. Did Ed. Perry sue out an injunction to restrain the pl't'ff and his trustee from selling the property described in the two deeds of trust on the property at Denison?

Ans. I don't know whether he did or not. There was something that occurred & delayed the sale, but I don't remember what it was. Mr. Nichols wanted to go to Sherman to investigate the matter, and I went with him, and he returned too late. Mr. Nichols consulted an attorney in Sherman in regard to the legality of the matter.

Q. Did Ed. Perry resist the sale under the second advertisement in any way?

Ans. Not that I ever heard of.

Q. What has become of the eight or ten thousand dollars of Denison City bonds that you deposited with the pl't'ff as collateral security for the payment of the notes in the bank & to him, described in those deeds of trust?

Ans. I don't know where they are. They were declared invalid, and he never got anything for them. They were declared worthless in the U. S. court in Texas. They were placed in W. H. Barnett's hands, but he never realized anything on them.

Q. Did you have any authority from the board of directors to make the three deeds of trust hereinbefore described?

Ans. I did.

Q. When was that authority given?

Ans. Before I made the deeds.

Q. How was it given?

Ans. By a resolution at a called meeting of the board of directors.

Q. Please give the date and annex a copy of the resolution to this deposition, to be marked Exhibit "A."

61 Ans. The date is 29th of May, 1875; it was a called meeting of the board at Denison, Texas. There were present at that meeting a quorum. I know there was a quorum. I was there myself and two other directors. I think the other two were F. A. Hyatt & F. L. Rankin. The book containing the record of the proceedings of the board of directors is lost, & I can't furnish the

copy called for. It was ratified at the stockholders' meeting in Nov., 1875.

Q. Why did you hold this called meeting at Denison?

Ans. Because they both were in Texas & it was hard to get a quorum together; they were scattered.

Q. Where did Rankin live?

Ans. He was then in business in Texas, and Hyatt lived there & I lived at Sedalia, Mo.

Q. Why was it that you were authorized to make these deeds of trust at that time?

Ans. Because we were out of money & couldn't pay the notes & the creditors were pressing us & the stockholders would not pay up their subscriptions.

Q. Where is the book of the proceedings of the board of directors?

Ans. It has disappeared in some way. Directly after the stockholders' meeting held Nov. 10, 1875, the book was put in the 1st Nat'l Bank of Sedalia, and when we went to find it some time afterwards it could not be found.

Q. State by whom it was put there.

Ans. By the secretary of the stockholders' meeting, M. J. C. Thompson, I think.

Q. Have you made any search for the book? If so, state when & where.

Ans. I made a very diligent search as soon as we missed it, & I have often searched for it since. Mr. Thompson has also searched for it. I searched for it all about & in the bank & everywhere I thought it could get, & Mr. Thompson has done the same; have been unable to find it.

Q. How does it come that you have copies of the proceedings of the stockholders' meeting held Nov. 10, 1875, & have not the book itself?

Ans. After the sec'y had copied the proceedings of the
62 meeting in the book he gave the minutes to me & I put them in my box in the vault in the bank with the other papers pertaining to the business of the company.

Q. Is E. S. Barrett any relation to you? If so, state what.

Ans. He was my brother; he is now dead.

Q. Why were these two notes not credited with their *pro rata* of the proceeds of the sale of the property under the two deeds of trust on the property at Denison?

Ans. I don't know anything about it, except that I suppose they put it on the other notes.

Q. Did the plaintiff ever talk to you or tell you why the money arising from the sale of the Denison property was applied to the payment of the other notes and none of it applied to the two notes in controversy?

Ans. I don't remember his ever saying anything about it.

Q. Was there ever any understanding between he & you in regard to applying the proceeds of the sale of that property?

Ans. I don't remember ever having any conversation or understanding in regard to the matter at all; don't think we ever did.

Q. There is a credit of $25.00 endorsed on the execution issued on the judgment in favor of the pl't'ff & against the T. & A. R. C. Co. arising from the sale by the sheriff of one-half interest in a certain ice-house of the T. & A. R. C. Co. on 7th of M'ch, 1876, as sold to you. Did you pay that amount of money to the sheriff?

Ans. Yes, sir; I think I did.

Q. Who got the $12.00?

Ans. I don't know; I never got it; that's all I know about it.

Q. Did you have the present suit instituted against the defendants?

Ans. I had nothing to do with it.

Q. Did the pl'ff have the present suit instituted against the def'ts.

Ans. I suppose he did.

63 Q. Who made the bargain with the M., K. & T. in regard to the sale of refrigerator cars?

Ans. Mr. Nichols. I knew more about the cars than Nichols, & did some talking in the matter to aid in making the trade. Nichols did the principal part of the trading.

Q. State who has the original deeds of trust.

Ans. Mr. Geo. P. B. Jackson, att'y for pl't'ff.

Q. From whom did he get them?

Ans. I gave them to him.

Q. When did you get them in your possession?

Ans. I don't remember. Mr. Nichols gave them to me & told me to take care of them. That was after I had had the settlement with him after I borrowed the money on my farm.

Cross-examination by GEO. P. B. JACKSON, attorney for plaintiff:

I am still president of the T. & A. R. C. Co. All the notes referred to in my examination-in-chief as having been negotiated to the Commercial Bank & to Mr. Nichols were endorsed by me individually. I endorsed them for the T. & A. R. C. Co. I was obliged to do it to get the money, & was wholly & entirely for their benefit. I simply endorsed them as surety. I had authority from the directors to execute those notes. The paper produced, of which a copy is hereto attached, marked Exhibit B, is the original resolution adopted by the board, & which was afterwards entered on the record book. In regard to the note which was not protested, the bank demanded payment from me immediately upon maturity of the note, & from my knowledge of the affairs of the car company I knew it was not paid when due. It was some little time after I had the contract with Mr. Nichols for the settlement of these notes before I turned over to him the amount of money called for by the

64 notes. At the time I made the contract with Mr. Nichols for the settlement the notes mentioned in the deeds of trust as belonging to the bank were still the property of the bank. At that time Mr. Nichols was the cashier of the Commercial Bank. The arrangement was made with Mr. Nichols at that time that I should

pay off all the notes held by him and his bank, and that he would procure these two notes from the bank, and I would place $10,000, the amount of these two notes, in his hands, for which he would give me his note upon the condition that he would institute and prosecute such proceedings as might be necessary and available to recover from the company or its stockholders the amount unpaid on stock. At that time I did not have the money necessary for the purpose in cash and it was necessary for me to mortgage my farm to raise it. It was a part of the consideration that in obtaining that agreement from Mr. Nichols *that* I should mortgage my farm to raise the money without unnecessary delay. It was a part of the inducement to me to mortgage my farm to raise this money that Mr. Nichols should obtain these notes from the bank and carry them until I realized on the mortgage and then institute and prosecute the suits as before stated. Mr. Nichols procured the notes from the bank and I set about to procure the loan on my farm. I made the settlement with him entirely from the money I realized from the loan on my farm from the Northwestern Insurance Co. That money was not realized till the 16th day of December, 1875, the date of the deed of trust, and it was after that date that I paid off the other notes and placed in his hands the $10,000, the amount of these notes. It was the express understanding that these two notes were not to be paid by this arrangement. The other notes mentioned in the deed of trust were turned over to me as paid. It is a fact that these two notes were never turned over to me either as the
65 president of the car Co. or individually, nor to the company or any of its officers. At the time I realized on the loan on my farm I placed the $10,000 in Mr. Nichols' hands and took from him the note mentioned in my examination-in-chief. He has ever since had that money in his hands and has now. He has never paid me any interest on it. It is a fact that out of that arrangement he makes the interest of the $10,000. It was so contemplated in my agreement with him. In the event that Mr. Nichols fails to recover anything on the two notes on which he sued he is entitled, under my agreement with him, to still hold me liable on said notes, and he will be entitled to use them in payment of the note I hold against him, and if he recovers only a part of it he will, under that arrangement, hold me liable for the amount uncollected and apply it in payment of the note I held against him. There was no purpose to cover up anything in having the suit brought by Nichols. I was advised that judgment could be obtained quicker by having the suit brought by Mr. Nichols than if I had paid them off and brought suit in my own name. The sales under the deeds of trust had taken place at Denison prior to the settlement I had with Mr. Nichols. I had become liable to the Wasson Man'f'g Co. At the time Mr. Nichols sold the cars bought by him at the trustees' sale to the M., K. & T. R'y Co. I had already paid off part of these notes and placed the $10,000 some time before. At the time Mr. Nichols sold these cars he had received from me under the agreement the whole amount of the notes which had been given to him and his bank, and he allowed me whatever profit there was on the sale of the cars

or rather excess above the debt due to the Wasson Co. He was not bound to do this, but did it as a favor to me. It was in pursuance of this act on his part that I had the arrangement referred to
66 in my examination-in-chief with the Wasson Man'f'g Co. and the Agawam Bank, by which that bank accepted the obligations of the M., K. & T. R'y Co. and advanced to me the excess thereof above the debt due to the Wasson Man'f'g Co. and took my note for it. The payments made by me to the Wasson Man'f'g Co. between the time Mr. Nichols bought the cars and the time he sold them were made in view of the facts that I had furnished him the amount of money called for by his notes and that he was to give me the benefit of what could be realized out of the sale of the cars. I received the insurance money on the slaughter-houses on the same idea and under similar circumstances as those detailed as to the sale of the cars. I have not received as much under the benefits allowed me by Mr. Nichols as the amounts I paid for the benefit of the company on account of my liability as its surety, not as much as I paid on account of my endorsements to the bank and to Mr. Nichols, and I paid large sums on account of my endorsements on other notes, for which I have received nothing. I tried to sell the Chicago property for the benefit of the company, as its president, before it was sold under the deed of trust. I tried repeatedly and had Mr. Ellis try. According to my recollection I was told that it might be sold for $4,000 or $4,500.00, but I never had any direct offer. I don't know what it could be sold for at the present time. At the time it was sold under the deed of trust there were some delinquent taxes on the land. At the time it was sold under the deed of trust there was a cloud upon the title. It cost $1,550.00 to straighten up the title. The title, I think, is all right now. I identify the papers produced as the ones under which the stockholders' meeting was held Nov. 10, '75, of which copies are hereto attached, marked Exhibits C, D, & E. I, as president, also issued a call for a stockholders' meeting at the same time which I
67 identify as the paper marked Exhibit F. A stockholders' meeting was held in pursuance of these notices. I was present. H. D. Mirick was present and participated in the meeting. I don't think Stevens' stock was represented by Mirick. By reason of the loss of the record book, as before explained, it can't be produced, but among the papers of the corporation I find the original resolutions and minutes of that proceeding, which are here produced, and copies of which are hereto attached, marked Exhibits G, H, I, J, K, L, M, N, & O & P. The minutes of the proceedings are in the handwriting of J. C. Thompson. The resolutions are in my handwriting, except No. 8, Exhibit O, the endorsements thereon being in the handwriting of J. C. Thompson, and the certificate of election of directors is in the handwriting of J. B. Gantt, except the signature of R. C. Sneed, which is in his handwriting. The board of directors' record book was present at that meeting. A statement of the affairs of the company was presented to that meeting. The affairs of the company and the transactions referred to in the resolutions were explained in full and discussed before the adoption of

the resolutions. The last lot of exhibits correctly shows the proceedings of that meeting. (Witness here produces a paper which he identifies as the original subscription to the capital stock, a copy of which is hereto attached and marked Exhibit Q.) I know the signature of R. S. Stevens to the subscription paper, and I saw him sign it, and also the words "fifty shares (50)" opposite his name. None of the stock subscribed by Robinson was ever paid in by him, and he never had any certificate, and he refused to pay anything on his stock; and we found nothing could be made out of him. We issued the stock to somebody else. T. L. Rankin also failed to make any payment on his subscription, and no certificate was issued
68 to him therefor. Hyatt afterwards transferred some of his stock to Rankin. Upon reflection I think that Montgomery and Thompson's stock was not transferred to them by me, but they made an original subscription. No certificate of stock was ever issued to Stevens in conformity with the subscription he made. A certificate for one thousand dollars' worth of stock was issued to H. D. Mirick. I have his receipt for it in the shape of a stub in the certificate book, a copy of which is hereto annexed, marked Exhibit R. I know the signature of H. D. Mirick. It is his signature on the stub. Mr. Stevens acted as director in this company from its very start till the stockholders' meeting in November, 1875. He was always consulted in regard to the business and knew as much about it as I did. Mr. Stevens paid $1,000.00 on his subscription—$5,000.00. We issued stock to the subscribers upon the payment of 50 per cent. thereof. Mr. Stevens was entitled to $2,000.00 of stock upon the payment of the $1,000.00. In the certificate book of the company is a stub of a certificate for 20 shares to R. S. Stevens, a copy of which is hereto attached, marked Exhibit S. This stub is not receipted, and I don't know whether or not Mr. Stevens ever received the certificate, but it is detached from the stub, and I don't know where it is. The writing on the stub is not mine; it is that of L. B. Jackson, the secretary of the company. That certificate of stock was not intended to be in full of the subscription of Mr. Stevens. It was to represent the amount of stock of which the $1,000.00 payment would be 50 per cent. I don't know whether I signed that certificate as president or not. There was never any release to Mr. Stevens of his $5,000.00 subscription. There was never in any manner any action by the board of directors or the company concerning the subscrip-
69 tion of Mr. Stevens or the amount of stock that should be issued to him. This certificate was made out upon the idea of the officers of the company that they only had the right to issue in double the amount of payment made. The business of the company was slaughtering and shipping beeves in the refrigerator cars over the M., K. & T. R'y from Denison, Texas, and we were compelled to ship over that road as the only outlet. Mr. Stevens was general manager of that road. The making of terms with the railroad was a large element of the profit and success of the enterprise. Mr. Stevens said he would not pay but $1,000.00, and we could not afford to contend with him at that time because of his position in the railroad, as he could have controlled the whole business and thereby have

rendered it unprofitable. Mr. Stevens knew I had become responsible as endorser on the paper of the company. I could not obtain credit for the company without endorsing its paper. At the time of the failure of the company my liability for it was greater than a fair cash valuation of all of its assets. I paid everything that I was endorser upon, including large amounts in addition to that due to the Commercial Bank and Nichols. In addition to those named in the deeds of trust before mentioned I was endorser on a note made for $15,000 to the First National Bank of Denison. I sold $5,000 worth of stock in that bank for $4,250.00, and loaned it to the company and took the note of the company endorsed by Joel Ellis and myself for $4,250.00, dated May 22, '75, due one day after date, bearing 10 per cent. interest. The note has never been paid to me; I still hold it.

Redirect:

I signed a letter to Mr. Stevens, dated Sedalia, Mo., May 13, '75, a copy of which is hereto attached and marked "Exhibit T."

70 —. In this letter you call upon him to pay 50 per cent. of 20 shares of stock; if he had more than 20 shares of stock in the company why did you call upon him to pay on only 20 shares?

Ans. Because he said he would not pay any more and I wanted to avoid any trouble with him.

Question. Who settled the account between you and the company for which the note is given?

Ans. The book-keeper, I suppose.

Question. Would you have loaned the $10,000.00 to plaintiff and for which you now hold his due bill or note if he had not agreed to institute and prosecute the suit on the two notes in controversy for your use and benefit?

Ans. No. The suit was commenced Dec. 11, 1875, on the notes by Nichols against the company.

Question. When you speak about not having released Stevens from the $5,000.00 subscription you mean there was no written or formal release by you or the company?

Ans. I mean there was no formal release by the company or no verbal or formal release by me, and there was no sort or semblance of a release.

Question. Have you not stated all the notes on which you were endorser for the company which were not paid out of its assets?

—. Yes; I think I have.

(Signed) J. R. BARRETT.

STATE OF MISSOURI, } ss:
County of Pettis, }

I, Clifford L. Jackson, notary public, do certify that, in pursuance of the agreement of the parties to this action, on the part of Geo. P. B. Jackson, attorney for pl'ff, and James Carr, attorney for def'ts, J. R. Barrett came before me at the law office of Geo. P. B. Jackson, in Sedalia, in the county and State last aforesaid, who was

71 by me sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined and his examination was reduced to writing and subscribed by him in my presence on the day, between the hours, and at the place in that behalf first aforesaid, and his said deposition is now herewith returned; and I hereby certify that the said J. R. Barrett is a resident of Pettis county, State of Missouri; and I further certify that I was duly qualified as a notary public on the 20th day of Dec., 1881, and my term expires Dec. 20, 1885.

In testimony whereof I have hereunto set my hand and notarial seal, at Sedalia, in the county and State aforesaid, this 13th day of November, 1883.

[SEAL.] CLIFFORD L. JACKSON,
Notary Public.

EXHIBIT "B," Referred to in Barrett's Deposition.

Resolved, That the president be authorized to build and equip a cooling-house at Denison in connection with slaughter-house there.

Resolved, That as it is necessary in order to carry on the business of the company to have more money *that* the president is hereby authorized to borrow such amount as may be necessary for carrying on the business and to give the Co.'s paper therefor, and will protect him against any loss by reason of his endorsement as security therefor.

EXHIBIT "C."

Barrett's Deposition.

SEDALIA, Mo., *Oct.* 23*d*, 1875.

To A. D. Fisher, justice of the peace, Sedalia, Pettis Co., Mo.:

The undersigned would represent that they are stockholders
72 and members of the Texas and Atlantic Refrigerator Car Company, and that on account of legal impediments a legal meeting of such corporation cannot be called.

Wherefore they pray that you will as such justice issue a warrant to either of us directing us to call a meeting of such corporation, by giving notice thereof as by law required.

(Signed) JNO. MONTGOMERY, JR.
J. C. THOMPSON.

EXHIBIT "D."

Barrett's Deposition.

STATE OF MISSOURI, *County of Pettis:*

To John Montgomery, Jr., Greeting:

Whereas on the written application of yourself and James C. Thompson, as members of the Texas and Atlantic Refrigerator Car

Company, it appears that there are legal impediments in the way of a legal meeting of said corporation otherwise, this — to warrant and direct you as such members to call a meeting of said corporation, as provided by law in such cases made and provided.

Given under my hand the 23rd day of October, 1875.

(Signed) A. D. FISHER,
Justice of the Peace within & for Pettis Co., Mo.

EXHIBIT "E."

Barrett's Deposition.

Notice of stockholders' meeting.

Pursuant to a warrant issued by A. D. Fisher, a justice of the peace within and for the county of Pettis and State of Missouri, of date October 23rd, 1875, notice is hereby given to the stock-
73 holders of the Texas and Atlantic Refrigerator Car Company that there will be a meeting of the stockholders of said corporation at the law office of Pilips and Vest, in the city of Sedalia, Pettis county, Missouri, on the 10th day of November, A. D. 1875, the object and purpose of which is to elect a board of directors for said corporation to examine into the action of the board of directors in giving deeds of trust on the property of said corporation to secure certain indebtedness of said company to the Commercial Bank of St. Louis, Missouri; to the First National Bank of Sedalia, Missouri; to the North Granville National Bank of North Granville, New York; to the Sedalia Savings Bank of Sedalia, Missouri; to J. C. Thompson, of Sedalia, Missouri, and to William Nichols, of St. Louis, Missouri, and to approve of their action or take such steps as may be necessary to protect the interest of said corporation if said deeds of trust were improperly given, and also to ascertain the extent of the indebtedness of said corporation and to provide for its adjustment and settlement — the collection of unpaid subscription, and also to examine into the acts and doings of the president of said corporation touching said indebtedness and the management of the affairs of said corporation, and to take such action thereon as may be advisable or necessary, and for such other and further action on the part of said stockholders as they may deem necessary for the adjustment and settlement of the difficulties of such corporation and for its further management.

Sedalia, Mo., Oct. 23, 1872.

(Signed) JNO. MONTGOMERY, JR.

STATE OF MISSOURI, *County of Pettis:*

74 Personally appeared before me, the undersigned, notary public within and for the county and State aforesaid, J. West Goodwin, who, being duly sworn according to law, on his oath says that he is the publisher of the Sedalia Bazoo, a newspaper printed and published in the city of Sedalia, county aforesaid; that the notice

to stockholders hereto annexed was published in said paper; that the first publication was on *the* Oct. 24, 1875, in volume 7, No. 30; that the 2nd publication was on Oct. 26, 1875, in volume 7, No. 20; that the 3rd publication was on Oct. —, in vol. —, No. —; and that the copy attached is a true copy of said publication.

(Signed) J. WEST GOODWIN.

Sworn to and subscribed before me this 10th day of Nov., 1875.

(Signed) J. C. THOMPSON,
Notary Public.

Printer's fee, $9.20.

EXHIBIT "F."

J. R. Barret's Deposition.

OFFICE OF THE "TEXAS & ATLANTIC REFRIGERATOR CAR COMPANY," SEDALIA, MO., *Oct. 18th*, 1875.

DEAR SIR: Notice is hereby given that there will be a meeting of the stockholders of the Texas and Atlantic Refrigerator Car Company, at the law office of Philips and Vest, in the city of Sedalia, Missouri, on the 10th day of November, 1875, the object and purpose of which is to elect a board of directors for said company and to ratify the action of the present board of directors in giving deeds of trust on the property of said company to secure certain indebtednss of said company to the Commercial Bank of St. Louis; to William Nichols; to the First National Bank of Sedalia, Missouri; to J. C. Thompson; to the North Granville National Bank of North Granville, New York, and the Sedalia Savings Bank; and to
75 take such other and further action as may be deemed fit and necessary for providing for and securing the indebtedness of said company, and approving the action of the president of said company touching said indebtedness and the management of the affairs of said company.

(Signed) J. R. BARRETT,
Pres. Texas & Atlantic Refrigerator Car Co.

EXHIBIT "G."

J. R. Barrett's Deposition.

At a meeting of the stockholders of the Texas and Atlantic Refrigerator Car Company at the office of Philips & Vest, in the city of Sedalia, in the State of Missouri, on the 10th day of November, 1875, the following proceedings were had: Notice to stockholders, petition to justice, warrant of justice, and published notice read by which meeting was called. List of stockholders read, showing 900 shares of stock; 590 shares represented at the meeting. R. C. Sneed and —— Gant appointed judges of election. The following duly elected directors for ensuing year: Joel Ellis, J. R. Barrett, J. C. Thompson, E. S. Barrett, T. L. Rankin.

J. R. Barrett presented statements and balance sheets from the books of the company, which were read.

H. D. Mirick offered a resolution that a committee of three be appointed from the stockholders to examine the books of the company and report at a meeting of this Co. to be held on the 11th day of Dec. Carried.

F. A. Hyatt offered a bill for services as sup't for 1 y'r & expenses p'd, am't'g to $6,000, with a cr. of $1,800. Disapproved—J. R. Barrett, E. S. Barrett, J. C. Thompson, opposed; F. A. Hyatt, H. D. Mirick, in favor.

Moved and seconded that resolution No. 1 be adopted. J. R. Barrett, 499 shares, E. S. Barrett, 1, J. C. Thompson, 2½, in
76 favor; H. D. Mirick, 10, opposed.

Moved and seconded that resolution No. 2 be adopted. Same vote as above. Moved and seconded that resolution No. 3 be adopted. E. S. Barrett, 1, J. R. B., 499, J. C. T., 2½, in favor; F. A. H., 75. Moved & seconded that No. 4 be adopted. J. R. B., E. S. B., & J. C. T., in favor; H. D. M., opposed.

No. 5, same as last.
No. 6, " " with Hyatt.
No. 7, " " " Hyatt & M. opposed.
No. 8, " " " "

Moved and seconded that the board of directors fix salaries of officers. Carried.

Moved and seconded that meeting adjourn to meet Dec. 11, at the office of Philips & Vest.

(Signed) J. C. THOMPSON, *Sec'y.*

EXHIBIT "H."

J. R. Barrett's Deposition (*No.* 1, *Adopted—J. C. Thompson*).

Whereas, at a meeting of the board of directors held at Denison, Texas, on the 29th day of May, 1875, as appears on page 17 of the record of the meeting of said board, J. R. Barrett, the president of said company, was authorized and empowered to execute and deliver deeds of trust or mortgages on all the real estate belonging to said company to certain creditors of said company then specified, and also to convey or sell all cars, bonds, & assets of said company to said creditors or any of them for the purpose of securing or liquidating said indebtedness; and whereas, in accordance with said resolution, the said president has, since the adoption
77 thereof, executed and delivered to W. R. Johnston, as trustee for William Nichols and the Commercial Bank of St. Louis, two certain deeds of trust, dated, respectively, on the 31st day of May, 1875, and on the 1st day of September, 1875, upon the slaughter-house, real estate on which same is situated, and all the appurtenances, fixtures, tools, engines, & personal property there situated and connected therewith, all in or adjoining the city of Denison, Grayson county, Texas, to secure said Commercial Bank upon four several notes or drafts owing by said

company and amounting in the aggregate to $20,000 principal, and to secure said William Nichols in the sum of $2,500, evidenced by a certain note for that sum held by him against said company; and whereas also, in accordance with said resolution, the said president did, on the first day of June, 1875, execute to A. S. Osgood, as trustee for the First National Bank of Sedalia, Missouri, James C. Thompson and William Nichols, Sedalia Savings Bank, and the North Granville National Bank, New York, a certain deed of trust upon the tract of land taken by said company from Joel Ellis upon his subscription to the capital stock of said company and situated in Cook county, Ill., in or near the city of Chicago, to secure said creditors in the following sums, viz: The First National Bank of Sedalia, Mo., in the sum of $2,500; James C. Thompson, $2,500; Sedalia Savings Bank, $1,500; North Granville National Bank, $5,000, all of said indebtedness being evidenced by notes and drafts of the company:

Now, therefore, the action of said board of directors in adopting said resolution and the action of J. R. Barrett, president, thereunder and in the execution and delivery of the said several deeds of trust above specified are in all respects hereby fully ratified and confirmed.

EXHIBIT "I."

78 *J. R. Barrett's Deposition* (*No. 2, Adopted—J. C. Thompson, Sec'y*).

Whereas, at a meeting of the board of directors — said company held at Sedalia, Mo., on the 10th day of March, 1875, the following resolutions were adopted, viz: Whereas the company is in debt and it has become necessary to have money to liquidate these debts and carry on the business of the company, it is resolved that the president make a call of fifty per cent. on stock of said company, and that he be authorized to collect the same for the purposes above mentioned; and whereas the said president did make the call on the stockholders: Therefore be it

Resolved, That the action of the board of directors and president in said resolution and call be, and the same is hereby, ratified and confirmed.

EXHIBIT "J."

J. R. Barrett's Deposition (*No. 3, Adopted—J. C. Thompson, Sec'y*).

Whereas J. R. Barrett, the president of the Texas and Atlantic Refrigerator Car Company, executed the company's note to J. V. Thurston & Co. for $4,000, payable three months after date, as appears from the approval of his action in that respect by the board of directors at a meeting held at Denison, Texas, May 6, 1874; and whereas it satisfactorily appears that such action of said president and board of directors was proper and for the best interest of the company: Therefore be it

Resolved, That the action of said president in said matter and of said board of directors is approved, — the same be, and is hereby, ratified and confirmed.

EXHIBIT "K."

J. R. Barrett's Deposition (*No.* 4, *Adopted—J. C. Thompson, Sec'y*).

Whereas the board of directors of the company, at a meeting held at Sedalia, Mo., on the 10th day of April, 1874, adopted certain resolutions in words and figures as fol.: Resolved, That the president be, and hereby is, authorized to build and equip a cooling-
79 house at Denison, in connection with the slaughter-house there; and resolved, as it is necessary in order to carry on the business of this company to have more money, the president is hereby authorized to borrow such amount as may be necessary for carrying on the business and to give the company's paper therefor, and the company will protect him against any loss by reason of his endorsement as security therefor, — resolution was unanimously adopted: Therefore be it

Resolved, That the action of the said president in the matter mentioned in said resolution and his acts and doings thereunder and the action of said board of directors in adopting said resolution are hereby fully and in all respects ratified and confirmed.

EXHIBIT "L."

J. R. Barrett's Deposition (*No. 5, Adopted—J. C. Thompson, Sec'y*).

Whereas, at a meeting of the board of directors of the Texas and Atlantic Refrigerator Car Co. held at Sedalia, Mo., on the 11th day of March, 1874, the following resolution was adopted: Whereas the company made a contract with Geo. H. Hammond & Co., of Detroit, Mich., to furnish cars and money for the purpose of killing beef, and the president of this company made this contract with Hammond & Co.: Now, it is resolved, That his action be confirmed and ratified. And whereas the approval of the acts of said president in the respect mentioned in said resolution appearing proper and necessary: Therefore be it resolved, That the action of said president and board of directors in the matter mentioned in said resulution be, and the same is hereby, in all respects ratified and confirmed.

EXHIBIT "M."

J. R. Barrett's Deposition (*No.* 6, *Adopted—J. C. Thompson, Sec'y*).

80 Whereas, at a meeting of the board of directors of the company held at Sedalia, Mo., on the 12th day of September, 1874, the following resolution was offered and approved by said board:

Resolved, That the president be authorized to sell Joel Ellis, of Chicago, twenty-five thousand dollars of the capital stock of the Texas and Atlantic Refrigerator Car Co., and to take in payment of the fifty per cent. called thereon a one-third interest in eighteen

acres of ground situated near Inglewood, in Cook county, Ill., some six miles from the court-house, in Chicago, Ill, the deed therefor to be made to A. D. Jaynes, Esq., in trust for this Co., was unanimously adopted;

And whereas it appears that in accordance with said resolution the president sold said Ellis $25,000 of stock in the company and accepted in payment of the fifty per cent. called thereon the land mentioned in said resolution: Therefore be it resolved, That the action of the president in selling said stock under said resolution and securing payment in accordance therewith is hereby approved and ratified.

EXHIBIT "N."

J. R. Barrett's Deposition (*No.* 7, *Adopted—J. C. Thompson, Sec'y*).

Whereas from the books of accounts of the company it is shown that the president thereof has charged the company with the sum of $5,000 per annum as his salary as president, as also with his necessary traveling expenses in — about business of said company;

And whereas it appears that his said services rendered in that behalf were well worth the sum so charged:

Therefore be it resolved, That the salary and expenses so charged be allowed said president, and that the proper officers of the Co. in settling with him allow him said sums so charged by him.

81 EXHIBIT "O."

J. R. Barrett's Deposition (*No.* 8, *Adopted—J. C. Thompson, Sec'y*).

Resolved, That whereas it has been necessary for J. R. Barrett, the president of the Texas and Atlantic Refrigerator Car Company, to act as treasurer for this company, to collect and pay out money of the company, it is hereby resolved that his acts as "*de facto*" treasurer of this company be, and the same are hereby, ratified, endorsed, and confirmed.

EXHIBIT "P."

J. R. Barrett's Deposition.

We, the undersigned, judges of the election held by the stockholders of the Texas and *Pacific* Refrigerator Car Company, do hereby certify that at the request of the stockholders in meeting on the 10th day of November, 1875, at the office of Philips and Vest, in the city of Sedalia, Mo., we acted as judges, and the vote stood as follows:

J. R. Barrett	502½	shares.
Joel Ellis	502½	"
J. C. Thompson	501	"
E. S. Barrett	502½	"
F. L. Rankin	501	"
W. R. Johnson	2½	"
H. D. Mirick	2½	"

And we find the first five names elected.

(Signed) J. B. GANTT.
R. C. SNEED.

Exhibit "Q," J. R. Barrett's deposition, will be found copied on page 35 of this bill of exceptions.

Exhibit "R," J. R. Barret's deposition, will be found copied on page 35 of this bill of exceptions.

82 Exhibit "S," J. R. Barret's deposition, will be found copied on page 36 of this bill of exceptions.

EXHIBIT "T."

J. R. Barrett's Deposition.

SEDALIA, MO., *May 13th*, 1875.

Col. R. S. Stevens, Sedalia, Mo.

DEAR SIR: At a meeting of the board of directors of the Texas and Atlantic Refrigerator Car Co., held at Sedalia, Mo., March 11th, 1875, the following resolution was unanimously passed:

Whereas this company is in debt and it becomes necessary to have money to liquidate their debts and carry on the business of the company, it is

Resolved, That the president of the company make a call of fifty per cent. on the stock of said company, and that he be authorized to collect the same for the purpose above mentioned.

You have twenty shares of capital stock in the Texas and Atlantic Refrigerator Car Company, on which you have paid fifty per cent. You will please forward to me, as president of the company, at Sedalia, Mo., on or before the 7th of June, 1875, one thousand dollars, being amount due, and I will return you a certificate of full paid-up stock. Owing to the misfortunes that frequently occur to a new business, and also that some of our stockholders did not take the stock first allotted to them, we have become embarrassed to an extent that we are obliged to make this call on the stock for relief. We have had only thirty-three thousand dollars paid in money on stock and twelve thousand five hundred dollars in Chicago property. We enclose you a statement of assets and liabilities. We think, if the stockholders will pay up promptly, that we can make money, and that the stock will be good property. Our last winter's
83 business made money, and, as we have become better acquainted with the business, think the future will give us a profit. We must have money to carry on the business, and to stop would be to sacrifice our property. Hoping you will remit to me at Sedalia, Mo., the amount due on your stock, I remain

Yours, very respectfully,

J. R. BARRETT,
President T. & A. Refrigerator Car Co.

The defendants next read in evidence the deposition of Lewis R. Snow, which is in words and figures as follows:

Lewis E. Snow's Deposition.

LEWIS E. SNOW, of lawful age, being produced, sworn, and examined on the part of the defendants, deposeth and saith:

My name is Lewis E. Snow. My age is 40. I reside in St. Louis, & am engaged in the business of insurance; am a partner in the firm of Delafield & Snow; have been in the business nearly 15 years. We insured a slaughter-house for William Nichols, in Denison, Texas, in the year 1877 or 1878. The insurance was for $5,000 in the aggregate. It was insured in two companies. One was the Lamar Insurance Company of New York and the other the Meriden Fire Insurance Company of Connecticut. The loss occurred Oct. 18th, 1878. We paid $4,400.00 to William Nichols—that is, we paid $2,200 on each policy. The Meriden policy claim of $2,200 was paid Jan. 7th, 1879, and the Lamar claim for same amount was paid Jan. 14th, 1879. We knew no one else in the transaction except Mr. Nichols.

And further deponent saith not.

LEWIS E. SNOW.

Subscribed & sworn to before me on the day, at the place
84 and between the hours aforesaid.

Witness my hand & official seal.

[SEAL.] C. M. NAPTON,
Notary Public.

The defendants next read in evidence a deed of trust made by the Texas and Atlantic Refrigerator Car Company, on the 31st day of May, 1875, to W. R. Johnson, trustee for the Commercial Bank of St. Louis and William Nichols, which is in words and figures as follows:

Deed of Trust by T. & A. Refrigerator Car Co. to W. R. Johnson, Trustee.

Copy from Book C, pages 101, 102, & 103, of Grayson county mortgage record.

This indenture, made this thirty-first day of May, A. D. 1875, by and between the Texas and Atlantic Refrigerator Car Company, of the first part, and W. R. Johnson, of the second part, and the Commercial Bank of St. Louis and W. Nichols, of the third part, witnesseth:

Said party of the first part, in consideration of the debt and trust hereinafter mentioned and created and of the sum of one dollar to it paid by the said party of the second part, receipt of which is hereby acknowledged, does by these presents grant, bargain, sell, and convey unto the said party of the second part and his heirs and assigns forever the following-described real estate, situated in the county of

Grayson and State of Texas, commencing at a point near the town of Denison two hundred and ten feet north of a stake set at a point on the north line of Johnson street fifty feet from the west line of Crockett street, thence east 178 feet (one hundred and seventy-eight) to a point forty-five feet west of the centre of the main track of the Missouri, Kansas and Texas railway; thence northwardly two
85 hundred and twenty-six feet (226), parallel with the refrigerator slaughter-house building, to a point thirty feet west of the centre of main track; thence west two hundred and fifty-eight feet (258) to a stake set; thence south three hundred and ten feet (310) to place of beginning, containing one and four-tenths acres (1.4), less the area included within the fifty feet belonging to the railway reservation.

Also all the right, title, and interest, by way of leasehold or otherwise, of the said party of the first part in and to the following-described real estate, situated near the town of Denison aforesaid, commencing at the corner on the north side of Johnson street, at the intersection of Lamar street on the east side of Lamar street, thence north four hundred and twenty feet along the east side of Lamar street prolonged, and thence east three hundred and fifty feet (350) to a stake; thence south two hundred and ten feet (210) to a stake; thence east one hundred and seventy-three feet (173) to a point fifty feet from the centre of the main track of the Missouri, Kansas and Texas railroad; thence southerly parallel with the said railway track two hundred and twenty-eight feet (228) to a stake on the north side of Johnson street; thence west parallel and along said Johnson street four hundred and ninety-six feet (496) to the place of beginning, containing four and one-tenth acres (4.1), more or less, with all the right, privileges, and appurtenances to the said tract of real estate belonging.

In trust, however, for the following purposes: Whereas the said Texas and Atlantic Refrigerator Car Company did, on the 25th day of April, A. D. 1875, make or draw its certain bill of exchange, bearing the date last aforesaid, on one Joel Ellis for the sum of five thousand dollars, and which said bill of exchange was accepted by said Joel Ellis in writing and endorsed by one J. R. Barrett and
86 payable at the Bank of New York, N. B. A., New York city, three months after its date, which said bill of exchange is the property of the said Commercial Bank of Saint Louis, having been discounted by said bank; and whereas the said Texas and Atlantic Refrigerator Car Company has executed and delivered to said Commercial Bank of St. Louis its three several promissory notes of dates and amounts as follows, viz: One note bearing date sixth day of May, 1875, for the sum of $5,800 (five thousand eight hundred), due three months after date; also one note bearing date the fourteenth day of May, 1875, for the sum of four thousand two hundred ($4,200) dollars, due three months after date; also one note bearing date the twentieth day of May, 1875, for the sum of five thousand (5,000) dollars, due and payable three months after date, all three of said notes being endorsed by Joel Ellis and J. R. Barrett; and whereas the said Texas and Atlantic Refrigerator Car Company did,

on the twenty-second day of May, 1875, execute and deliver to one A. W. Nichols, of the city of St. Louis, its certain promissory note of the date last aforesaid, due one day after date, for the sum of two thousand five hundred dollars ($2,500), with ten per cent. interest from date, and endorsed by Joel Ellis and J. R. Barrett: Now, if the said Texas and Atlantic Refrigerator Car Company shall pay the sum of money specified in said bill of exchange and notes, with all the interest and damages that may be due thereon when said bill of exchange and notes shall be due and payable according to the tenor and effect thereof, then this deed shall be void and the property hereinbefore conveyed shall be released at the expense of said Texas and Atlantic Refrigerator Car Company; otherwise this deed shall remain in full force and the said W. R. Johnson may proceed to sell the property hereinbefore described, or so much thereof as may be necessary, to pay the amount specified in said bill of exchange and notes, with interest, and the
87 costs of this trust at public vendue for cash at the Alamo Hotel, in the town of Denison aforesaid, first giving thirty days' notice of the time, terms, and place of sale of the property to be sold by advertisement in some newspaper published in said town of Denison, and, upon the sale and payment of the purchase-money, shall execute and deliver a deed of the property sold to the purchaser, and any statement of facts or recital by the said trustee in relation to the non-payment of the money secured to be paid, the advertisement, sale, receipt of the money, and the execution of the deed to the purchaser shall be received as *prima facie* evidence of such fact, and the said trustee shall, out of the proceeds of such sale, pay, first, the costs and expenses of this trust, and, next, whatever may be in arrear and unpaid on the bill of exchange and notes aforesaid; and the said W. R. Johnson, trustee as aforesaid, covenants to and with the said Texas and Atlantic Refrigerator Car Company and the said Commercial Bank of St. Louis and W. Nichols, severally, faithfully to perform and fulfill the trust herein created: Provided further, That, in case default being made in payment of said bill of exchange and notes, and the absence, sickness, or other inability of said trustee to act, or his refusal to act, the then sheriff of Grayson county, Texas, may, on the request of said parties of the second part, proceed to advertise and sell the property before described for the purposes and under the terms and limitations before set forth, and may execute to the purchaser a deed for said property, with the same recitals and effect as hereinbefore recited.

In witness whereof the said parties to these presents have hereunto subscribed their hands and affixed their seals this thirty-first day of May, A. D. 1875.

TEXAS AND ATLANTIC REFRIGERATOR CAR CO.,

88 By J. R. BARRETT, *President.* [SEAL.]

W. R. JOHNSTON. [SEAL.]

STATE OF MISSOURI, *County of Pettis:*

Before me, the undersigned, notary public in and for the county and State aforesaid, duly commissioned and qualified, personally appeared Jonathan R. Barrett, to me well known to be the individual described in and who executed the above and foregoing conveyance as president of the Texas and Atlantic Refrigerator Car Company, *as* he acknowledged to me that he executed said deed as president of the Texas and Atlantic Refrigerator Car Company for the uses, purposes, and considerations therein stated, and that the same is his act and deed as said president.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this first day of June, A. D. 1875.

JOHN A. LACEY, [SEAL.]
Notary Public.

Filed and recorded June 8th, 1875.

G. A. DICKERMAN, *Clerk.*

THE STATE OF TEXAS, }
County of Grayson, } *ss:*

I, G. A. Dickerman, clerk of the county court and recorder of deeds, mortgages, &c., within and for said county, do hereby certify that the foregoing pages, from 1 to 9, both inclusive, contain a full, true, and complete copy of the instrument of writing therein described, and also of the certificate of acknowledgment annexed to said instrument, and that said instrument is recorded in Mortgage Book "C," on pages 101, 102, & 103 of Grayson county records.

In testimony whereof I have hereunto subscribed my name and impressed my seal of office, at Sherman, on this 9th day of Oct'r, A. D. 1883.

[SEAL.] G. A. DICKERMAN, *Clerk.*

89 STATE OF TEXAS, *County of Grayson:*

I, S. D. Steedman, sole judge of the county court of said county, do hereby certify that G. A. Dickerman, whose genuine signature appears to the foregoing certificate, is and was at the date thereof an acting clerk — county court within and for said county, duly commissioned and qualified and authorized by law to take acknowledgments, administer oaths, etc., and full faith and credit is due to all his official acts as such, and that his said certificate is in due form of law.

Given under my hand and seal of office, at Sherman, this 9th day of October, A. D. 1883.

[SEAL.] S. D. STEEDMAN,
County Judge, Grayson Co., Tex.

The defendants next read in evidence a deed made by W. R. Johnson, as trustee under said deed of trust, on the 13th day of

November, 1875, to William Nichols, which is in words and figures as follows:

Deed of Trust by W. R. Johnson, Trustee, to Wm. Nichols.

THE STATE OF TEXAS, *Grayson County:*

Whereas on the 31st day of May, 1875, the Texas and Atlantic Refrigerator Car Company executed and delivered to me a deed conveying to me in trust to secure the payment of a bill of exchange and notes therein described the property hereinafter described; and whereas by said deed I was empowered and authorized to sell said property upon the failure of said company to pay the same, and the said company having failed to pay the said bill of exchange and notes, but the same being due and unpaid, I, W. R. Johnson,
90 trustee, advertised the said property for sale for thirty days in the Denison News, a newspaper published in Denison, specifying the terms, time, and place of sale, and describing the property, and on the 13th day of November, 1875, at the Alamo Hotel, in Denison, in pursuance of said notice, between the hours of 8 o'clock a. m. and 6 o'clock p. m., I offered said land for sale at public outcry to the highest bidder for cash, when William Nichols bid therefor the sum of two thousand dollars, and that being the highest and best bid the same was knocked off to him:

Now, therefore, in — by virtue of authority in me vested by said deed of trust and in consideration of the said sum of two thousand dollars to me in hand paid by said William Nichols, the receipt of which I hereby acknowledge, I, W. R. Johnson, trustee for the Texas and Atlantic Refrigerator Car Co., hereby convey to said William Nichols all of the right, title, and interest of the said Refrigerator Car Co. in and to the two following described tracts of land, to wit, in Grayson county, Texas, the 1st described as follows, to wit: Commencing at a point near the town of Denison (210) two hundred and ten feet north of a stake set on the north line of Johnson street (50) fifty feet from the west line of Crockett street, thence east (178) one hundred & seventy-eight feet to a point forty-five feet west of the center of the main track of the Missouri, Kansas and Texas railway; thence northwardly two hundred and twenty-six (226) feet parallel with the refrigerator slaughter-house building to a point (30) thirty feet west of the center of main track; thence west two hundred and fifty-eight feet to a stake set; thence south three hundred and ten (310) feet to the place of beginning, containing one & four-tenths acres, less the area included within the fifty feet belonging to the railroad reservation. The second tract, situ-
ated near the town of Denison, commencing at the corner
91 on the north side of Johnson street, at the intersection of Lamar street on the east of Lamar street, thence north four hundred and twenty (420) feet along the east side of Lamar street prolonged; thence east three hundred and fifty feet to a stake; thence south two hundred & ten (210) feet; thence east one hundred & seventy-three feet to a point fifty feet from the center of the main

track of the Missouri, Kansas and Texas railway; thence southerly parallel with said railway track two hundred & twenty-eight feet to a stake on the north side of Johnson street; thence west parallel to and along said Johnson street four hundred & ninety-six feet to the place of beginning, containing four $\frac{1}{10}$ acres, more or less, and for description reference is made to said deed of trust; to have and to hold to said William Nichols, his heirs and assigns, forever, with all the rights and appurtenances to the same belonging.

Witness my hand November 13th, 1875.

W. R. JOHNSON, *Trustee.*

THE STATE OF TEXAS, *County of Grayson:*

Before me, J. M. Cook, a notary public in and for said county of Grayson, personally came W. R. Johnson, by whom the foregoing deed, bearing date 13th Nov. 1875, appears to have been executed, and acknowledged that he executed the same for the consideration and purposes therein stated; to all of which I certify by hereto setting my hand officially, with the seal of my office, this the 13th day of November, A. D. 1875.

[SEAL.] J. M. COOK,
Notary Public, Grayson County, Texas.

Filed for record Nov. 13th, 1875; recorded November 15th, 1875.
G. A. DICKERMAN, *Clerk.*

THE STATE OF TEXAS, } ss:
County of Grayson, }

92 I, G. A. Dickerman, clerk of the county court and recorder of deeds, mortgages, &c., within and for said county, do hereby certify that the foregoing pages, from 1 to 4, both inclusive, contain a true, full, and complete copy of the instrument of writing therein described, and also of the certificate of acknowledgment annexed to said instrument, and that said instrument is recorded in vol. No. 32, on page 129, of Grayson county records.

In testimony whereof I have hereunto subscribed by name and affixed my seal of office, at Sherman, on this 9th day of October, A. D. 1883.

[SEAL.] G. A. DICKERMAN, *Clerk.*

STATE OF TEXAS, *County of Grayson:*

I, S. D. Steedman, sole judge of the county court of said county, do hereby certify that G. A. Dickerman, whose genuine signature appears to the foregoing certificate, is and was at the date thereof an acting clerk — county court within and for said county, duly commissioned and qualified and authorized by law to take acknowledgments, administer oaths, etc., and full faith and credit is due to all his official acts as such, and that his said certificate is in due form of law.

Given under my hand and seal of office, at Sherman, this 9th day of October, A. D. 1883.

[SEAL.] S. D. STEEDMAN,
County Judge, Grayson County, Tex.

The defendants next read in evidence a deed of trust made by the Texas and — Refrigerator Car Company, on the 1st day of September, 1875, to W. R. Johnson, as trustee for the Commercial Bank of St. Louis and William Nichols, which is in words and figures as follows:

93 *Deed of Trust of Texas & Atlantic Refrigerator Car Co. to W. R. Johnson, Trustee, Dated September* 1, 1875.

This indenture, made the first day of September, A. D. 1875, by and between the Texas and Atlantic Refrigerator Car Company, of the first part, and W. R. Johnson, of the second part, and the Commercial Bank of Saint Louis and W. Nichols, parties of the third part, witnesseth:

That the said party of the first part, in consideration of the debt and trust hereinafter mentioned and created and of the sum of one dollar to it paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, and convey unto the said party of the second part and to his heirs and assigns forever the following-described personal property, to wit, one steam-engine and boiler and one cooling apparatus and fixtures, two iron tallow tanks, one large iron tallow vault, together with all the tools and fixtures now in and belonging to the slaughter-house and yard, in the town of Denison, Texas, all of said personal property being on the real estate described in a deed of trust executed on the 31st day of May, 1875, by the Texas and Atlantic Refrigerator Car Company to Commercial Bank of St. Louis, Missouri, and William Nichols, recorded June 7th, 1875, in Grayson county, in Mortgage Record Book C, pages 101 & 104; also all the right, title, and interest of the Texas and Atlantic Refrigerator Car Company in and to fifty (50) cars marked "Texas and Atlantic Refrigerator Car Company," and numbered from 6001 to 6050, inclusive, now running on the Missouri, Kansas and Texas railroad, Chicago, Burlington and Quincy railroad, Missouri Pacific railroad, and the Chicago and Northwestern railroad, in trust, however, for the following purposes: Whereas the said Texas and Atlantic Refrigerator Car Company did, on the 25th day of April, 1875, make or draw a certain bill of exchange, bearing the date last afore-
94 said, on one Joel Ellis for the sum of five thousand (5,000) dollars, and which said bill of exchange was accepted by said oel Ellis in writing and endorsed by one J. R. Barrett and payable at the Bank of New York, N. B. A., New York city, three months after its date, which said bill of exchange is the property of the said Commercial Bank of St. Louis, having been discounted by said bank; and whereas the said Texas and Atlantic Refrigerator Car Company has executed and delivered to said Commercial Bank of St. Louis its

three several promissory notes, of dates and amounts as follows, viz., one note bearing date the sixth day of May, 1875, for the sum of five thousand eight hundred ($5,800) dollars, due three monts after date; also one note bearing date the fourteenth day of May, 1875, for the sum of four thousand two hundred ($4,200) dollars, due three months after date; also one note bearing date the twentieth day of May, 1875, for the — of five thousand (5,000) dollars, due and payable in three month after date, all three of said notes being endorsed by Joel Ellis and J. R. Barrett; and whereas the said Texas and Atlantic Refrigerator Car Company did, on the twenty-second day of May, 1875, execute and deliver to said W. Nichols, of the city of St. Louis, its certain promissory note of the date last aforesaid, due one day after date, for the sum of two thousand five hundred ($2,500) dollars, with ten per cent. interest from date, and endorsed by Joel Ellis and J. R. Barrett: Now, if the Texas & Atlantic Refrigerator Car Company shall pay the sums of money specified in said bill of exchange and notes, with all the interest and damages that may be due thereon when said bill of exchange and notes shall be due and payable according to the tenor and effect thereof, then this deed shall be void and the property hereinbefore conveyed shall be released at the expense of the said Texas and At-
95 lantic Refrigerator Car Company; otherwise this deed shall remain in full force; and the said W. R. Johnson may proceed to sell the property hereinbefore described, or so much thereof as may be necessary to pay the amount specified in said bill of exchange and notes, with interest and costs of this trust, at public vendue, for cash, at the Alamo Hotel, in the town of Denison aforesaid, first giving ten days' notice of the time, terms, and place of sale and of the property to be sold by advertisement in some newspaper published in said town of Denison, and upon the sale and payment of the purchase-money shall execute and deliver a deed to the property sold to the purchaser, and any statement of facts or recitals by the said trustee in relation to the non-payment of the money secured to be paid, the advertisement, sale, and receipt of the money, and the execution of the deed to the purchaser shall be received as *prima facie* evidence of such facts, and the said trustee shall out of the proceeds of such sale pay, first, the costs and expenses of this trust, and next whatever may be in arrear and unpaid on the bill of exchange and notes aforesaid; and the said W. R. Johnson, trustee, as aforesaid, covenants to and with the said Texas and Atlantic Refrigerator Car Company and the said Commercial Bank of St. Louis and W. Nichols, severally, faithfully to perform and fulfill the trust herein created: Provided, further, That in case default be made in the payment of said bill of exchange and notes and the absence, sickness, or other inability of said trustee to act or his refusal to act, the then sheriff of Grayson county, Texas, may, on the request of the said parties of the second part, proceed to advertise and sell the property before described for the purpose and under the terms and limitations before set forth, and may execute to the purchaser a deed for said property, with the same recitals and effect as hereinbefore recited.

96 In witness whereof we, the said parties to these presents, have hereunto subscribed their hands and affixed their seals this 1st day of September, A. D. 1875.

TEXAS AND ATLANTIC REFRIGERATOR CAR CO.,
By J. R. BARRETT, *President.* [SEAL.]
W. R. JOHNSON. [SEAL.]

STATE OF MISSOURI, } ss:
County of Pettis, }

Before the undersigned, notary public in and for the county and State aforesaid, duly commissioned and qualified, personally appeared Jonathan R. Barrett, to me well known to be the individual described in and who executed the above and foregoing conveyance as president of the Texas and Atlantic Refrigerator Car Company, and he acknowledged to me that he executed said deed as president of the Texas and Atlantic Refrigerator Car Company for the uses, purposes, and considerations therein stated, and that the same was his act and deed as said president; and I further certify that I was commissioned N. P. M'ch 1st, 1875, and that my commission expires M'ch 1st, 1879.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 1st day of September, 1875.

[SEAL.] W. L. FELIX, *N. P.*

STATE OF MISSOURI, } ss:
County of Pettis, }

Before the undersigned, notary public in and for the county and State aforesaid, duly commissioned and qualified, personally appeared W. R. Johnson, to me well known to be the individual described in and who executed the above and foregoing conveyance as trustee, and he acknowledged to me that he executed said deed for the uses, purposes, and considerations therein stated, and that the same is his act and deed; and I further certify that I was commissioned as notary public on the 1st day of M'ch, 1879,
97 and that my com. expires on the 1st day of M'ch, 1879.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 1st day of September, 1875.

[SEAL.] W. L. FELIX,
Notary Pub.

Filed for record Sept. 7th, 1875; recorded Sept. 11, 1875.
G. A. DICKERMAN, *Clerk.*

STATE OF TEXAS, } ss:
County of Grayson, }

I, G. A. Dickerman, clerk of the county court and recorder of deeds, mortgages, &c., within and for said county, do hereby certify that the within and foregoing pages, from 1 to 9, both inclusive, contain a true, full, and complete copy of the instrument of writing

therein described and also the certificate of acknowledgment annexed thereto, and that said instrument is recorded in Mortgage Book "C," on pages 248, 249, & 250, of Grayson county records.

In testimony whereof I have hereunto subscribed my name and impressed my seal of office, at office, in Sherman, on this 9th day of October, A. D. 1883.

[SEAL.] G. A. DICKERMAN, *Clerk.*

STATE OF TEXAS, *County of Grayson:*

I, S. D. Steedman, sole judge of the county court of said county, do hereby certify that G. A. Dickerman, whose genuine signature appears to the foregoing certificate, is, and was at the date thereof, an acting clerk of county court within and for said county, duly commissioned and qualified and authorized by law to take acknowledgments, administer oaths, etc., and full faith and credit is due to all his official acts as such; and that his said certificate is in due form of law.

Given under my hand and seal of office, at Sherman, this 9th day of October, A. D. 1883.

[SEAL.] S. D. STEEDMAN,
County Judge Grayson County, Tex.

98 The defendants next read in evidence a deed made by W. R. Johnson, as trustee under said deed of trust, on the 13th day of November, 1875, to William Nichols, which is in words and figures as follows:

Deed of W. R. Johnson, Trustee, to William Nichols, Dated November 13th, 1875.

STATE OF TEXAS, *Grayson County:*

Whereas on the first day of September, 1875, the Texas and Atlantic Refrigerator Car Company conveyed to me in trust the property hereinafter conveyed and described to secure the payment of certain notes and a bill of exchange therein described; and whereas — the said deed of trust I was empowered in case said notes and bill of exchange should not be paid by said Texas and Atlantic Refrigerator Car Company to sell said property for so much as should be necessary to pay the same, and the said Texas & Atlantic Refrigerator Car Co. have failed to pay said bill of exchange and notes, I, W. R. Johnson, proceeded to advertise said property for — days in the Denison News, a newspaper published in Denison, specifying the time, terms, and place of sale and the property to be sold; and in pursuance of said advertisement, by virtue of authority vested in me by said deed of trust, at the Alamo Hotel, in Denison, on the 13th day of November, between the hours of 8 o'clock — and 6 o'clock p. m., did offer the property hereinafter described for sale; at public outcry, to the highest bidder, for cash, when Wm. Nichols bid therefor the sum of one thousand dollars,

and, that being the highest and best bid, it was knocked off to him:

Now, therefore, in consideration of the sum of one thousand dollars, to me paid by Wm. Nichols, the receipt of which is hereby acknowledged, I, W. R. Johnson, hereby convey to said Wm. Nichols all
99 the right, title, and claim which the said Texas and Atlantic Refrigerator Car Co. had on the first day of September, 1875, in and to the following-described property, to wit, one steam-engine and boiler, one cooling apparatus and fixtures, two iron tallow tanks, one large iron tallow vat, together with all the tools and fixtures in and belonging to the yards of the slaughter-house, in the town of Denison, on the 1st day of September, 1875, and at the time and place aforesaid, by virtue of the deed of trust aforesaid, and in pursuance of the notice published as aforesaid, I offered for sale to the highest bidder for cash at public outcry the property described as follows—the cars of said company marked as follows: "Texas & Atlantic Refrigerator Car Co.," numbered from 6001 to 6050, inclusive, when Wm. Nichols bid therefor the sum of five hundred dollars, which being the highest and best bid the same was knocked off to him; and I, the said W. R. Johnson, trustee as aforesaid, by virtue of authority in me vested by said deed of trust, and in consideration of the said sum of five hundred dollars to me in hand paid by the said Nichols, receipt of which I hereby acknowledge, hereby convey to said Nichols, his heirs and assigns, all the right, title, and interest that the Texas and Atlantic Refrigerator Car Co. had in and to said cars on the 1st day of September, 1875, said cars being described as follows, marked "Texas & Atlantic Refrigerator Car Co.," and No. from 6001 to 6050, inclusive, being fifty in number; to have and to hold said cars to Nichols forever.

Witness my hand this 13th day of November, 1875.

W. R. JOHNSON, *Trustee.*

THE STATE OF TEXAS, *County of Grayson:*

Before me, J. M. Cook, a notary public in and for the said county of Grayson, personally came W. R. Johnson, by whom the
100 foregoing deed, bearing date 13th Nov., 1875, appears to have been executed, and acknowledged that he executed the same for the consideration and purposes therein stated; to all of which I certify by hereto setting my hand officially with the seal of my office this the 13th day of Nov., A. D. 1875.

J. M. COOK,
Notary Public, Grayson County, Texas.

Filed for record Nov. 13th, 1875; recorded Nov. 15, 1875.

G. A. DICKERMAN, *Clerk.*

THE STATE OF TEXAS, } ss:
County of Grayson, }

I, G. A. Dickerman, clerk of the county court and recorder of deeds, mortgages, &c., within and for said county, do hereby certify

that the within and foregoing pages, from 1 to 5, both inclusive, contain a true, full, and complete copy of the instrument of writing therein described, and also of the certificate of acknowledgment annexed thereto, and that said instrument is recorded in vol No. 30, on page 381, Grayson county records.

In testimony whereof I have hereunto subscribed my name and impressed my seal of office, in Sherman, on this 9th day of October, A. D. 1883.

[SEAL.] G. A. DICKERMAN, *Clerk.*

STATE OF TEXAS, *County of Grayson:*

I, S. D. Steedman, sole judge of the county court of said county, do hereby certify that G. A. Dickerman, whose genuine signature appears to the foregoing certificate, is and was at the date thereof an acting clerk — county court within and for said county, duly commissioned and qualified and authorized by law to take acknowledgments, administer oaths, etc., and full faith and credit is due all his official acts as such, and that his said certificate is in due form of law.

101 Given under my hand and seal of office, at Sherman, this 9th day of October, A. D. 1883.

[SEAL.] S. D. STEEDMAN,
County Judge, Grayson County, Tex.

The defendants next read in evidence a letter written by J. R. Barrett, as president of the Texas and Atlantic Refrigerator Car Company, dated Sedalia, Mo., May 13th, 1875, to the defendant Stevens, which is in words and figures as follows:

The letter here referred to is copied on page 82 of this transcript and is the same letter also referred to in the deposition of the witness, J. R. Barrett, on page 69 of this transcript.

HENRY D. MIRICK, being duly sworn, testified as follows:

I am one of the defendants in this suit. I took ten shares of stock in the Texas and Atlantic Refrigerator Car Company. I was allowed to do — by J. R. Barrett as a special favor. Barrett, the defendant Stevens, and myself all lived in Sedalia at the time the T. & A. Ref. Car Co. was organized. Stevens was the gen'l manager of the Missouri, Kansas and Texas Railroad Company. The general offices of that company were in Sedalia, Mo. I was in the employ of that company. The M., K. & T. railroad extended from Denison, Texas, to Hannibal, Mo. When the T. & A. Ref. Car Company was organized the defendant Stevens proposed it should be done on the following scheme: The company was to slaughter beeves at Denison, Texas, and transport the meat fresh in refrigerator cars from Denison, Texas, to New York city, for sale there, over the M., K. & T. railway, the Wabash railway, the Lake Shore, & the Erie railway, each of said railroads to furnish a certain number of

box cars, which were to be changed into refrigerator cars.
102 The change could be made at small expense to the Ref. Car Company. This would require only a small capital to commence business. J. R. Barrett, the president, agreed to the scheme and promised to carry it out. He went to New York in September following (September, 1873) to make arrangements to carry out this scheme, but when he got there and presented his scheme to different persons they said he ought to have his own refrigerator cars, and he got puffed up and went up to Springfield, Mass., and made arrangements with the Wasson Manufacturing Company to build one hundred refrigerator cars instead of getting the railroad company to furnish the box cars and having them changed to refrigerator cars. This put the Refrigerator Car Company in debt $100,000. When Barrett returned to Sedalia and informed Stevens of what he had done Stevens at once told him he would not take 50 shares in the T. & A. Ref. Car Co. with any such arrangement, but said he was willing to take 20 shares to encourage the enterprise. Barrett then agreed that Stevens' subscription should be reduced from 50 to 20 shares, and a call of 50% on the stock was made and Stevens' call was upon 20 shares, which he paid, and was regarded and treated as a holder of only 20 shares of stock in the T. & A. Ref. Car Co. Barrett talked with Stevens about the affairs of the company frequently. There were very few meetings of the board of directors. Barrett acted as president, secretary, treasurer, and everything else; in fact he was the company. He called a stockholders' meeting on the 10th of November, 1875, to ratify his acts as president. He held a large number of shares of stock, and friends of his held proxies of most of the other stockholders at the meeting. I was present at this meeting as a stockholder myself. Stevens was not there. Barrett got Phillips and Vest, as his attorneys, to prepare a
103 series of resolutions ratifying everything that he had done. He presented these resolutions to the stockholders' meeting. I opposed and voted against them in the meeting, but he and his friends carried the resolutions by a large majority. Those who held these proxies were all under his control and influence. I made a motion at the stockholders' meeting to have a committee of stockholders appointed to investigate the books and accounts of the T. — A. Ref. Car Co. and report at an adjourned meeting on the 11th of December. The committee was appointed, but I was not put on it, and the meeting never was held and the committee never reported. If Barrett had managed the business of the Co. properly it would have made money, and it would not have got in debt. Barrett charged a very high salary, $5,000 a year, for managing the business of the company. It was too much for a man of his business capacity. It was much higher than the small corporations were then paying for managing their business. In addition to his salary he charged for all his traveling expenses when away on the business of the company, and he traveled a great deal, and his traveling expenses—his charges against the company for his traveling expenses—were very large. I have applied to him to let me see the books of the company, but he says they are lost and can-

not be produced, and I have never been able to see the books. I was present in Sedalia and heard Stevens frequently talk to Barrett about the business of the company. I was present when Barrett returned from New York and informed Stevens that he had contracted with the Wasson Manufacturing Company to build 100 new refrigerator cars for the T. & A. Ref. Car Co., and Stevens disapproved of that contract and Barrett's action in making it. Stevens said it was contrary to the scheme on which he had subscribed fifty
104 shares to the capital stock of the T. & A. Ref. Car Co., and he would not take fifty shares in it since the scheme upon which the company had been gotten up had been changed. He said he would only take twenty shares in it. Barrett then said the Co. would not hold Stevens for fifty shares, but only for twenty shares.

Cross-examination:

Stevens was a director in the company. He did not attend the directors' meetings, but I heard Barrett frequently talk to him and tell him about the business of the company.

Q. You stated that Barrett had changed the scheme of the corporation; you mean by that that he bought a lot of cars?

—. Yes, sir.

Q. Didn't you know when he made that statement that it was originally contemplated that the Co. would or might purchase cars?

Ans. I don't know.

Q. You knew what was in the articles of incorporation, didn't you?

Ans. I suppose so.

Q. I will read them to you and ask you to then state to the jury if it was because of the purchase of cars that Mr. Stevens refused to take more than twenty shares.

The witness then answered: Yes, sir; that was the reason; I have only paid $500 on my stock and Stevens has only paid $1,000 on his. The books and papers of the company were present at the stockholders' meeting, and the matters complained of in my examination-in-chief were discussed at that meeting.

The plaintiff then read the articles of association and certificate endorsed thereon, which are in words and figures as follows:

Articles of Association of the T. & A. Ref. Car Co.

STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full,
105 true, and complete copy of the articles of association of the Texas and Atlantic Refrigerator Car Company, filed September 29, 1874, as the same appears on file, as the law directs, in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri.

Done at office, in the city of Jefferson, this twenty-fourth day of September, A. D. eighteen hundred and eighty-five.

[SEAL.] MICH'L K. McGRATH,
Secretary of State.

This is to certify that we, the undersigned, have associated ourselves together for the purpose of being incorporated under the general statute laws of the State of Missouri, and doing business as such incorporated company as herein specified.

Said corporation or association shall be known or designated by the corporate name of the Texas and Atlantic Refrigerator Car Company.

The object of said company and association shall be to transport and convey any and all sorts of freight, goods, wares, and merchandise, meats, fruits, vegetables, stock, &c., &c., from any one point in the United States to another with or without refrigerator cars, and over any railroads, canals, rivers, or lakes, or by means of any conveyance most convenient, safest, and cheapest; also for the purpose of slaughtering beeves and utilizing the parts in such manner as they deem profitable, and for any other purpose intended for mutual profit or benefit not otherwise specially provided for in these articles of association and not inconsistent with the constitution and laws of this State.

106 The amount of the capital stock of said company shall be one hundred thousand dollars, consisting of one thousand shares of one hundred dollars each.

The business of said company shall be conducted by five or more directors, and R. S. Stevens, J. R. Barrett, W. P. Robison, F. A. Hyatt, and T. L. Rankin shall be such directors and shall manage the affairs of said company for one year from the date of the filing of these articles in the recorder's office, and until their successors are elected and qualified.

The headquarters and general business office of this company shall be at Sedalia, in the county of Pettis and State of Missouri, and its said business carried on wherever necessary and desirable.

In testimony whereof we have hereunto set our hands and seals this twenty-third day of July, 1873.

T. L. RANKIN. [SEAL.]
J. R. BARRETT. [SEAL.]
F. A. HYATT. [SEAL.]
W. P. ROBISON. [SEAL.]
R. S. STEVENS. [SEAL.]

STATE OF MISSOURI, } ss:
County of Pettis, }

Before the undersigned, a notary public within & for the State and county aforesaid, personally came J. R. Barrett, F. A. Hyatt, W. P. Robison, and R. S. Stevens, parties whose names are subscribed to the foregoing instrument of writing and who are to me

personally known, and acknowledged that they and each of them had signed the same freely & voluntarily for the uses & purposes as therein expressed.

In testimony whereof I have hereunto set my hand & official seal, at office, in Sedalia, this 23d day of July, A. D. 1873.

[SEAL.] L. B. JACKSON,
Notary Public.

STATE OF TEXAS, }
County of Grayson, } *ss:*

Before me, a notary public in and for the county of Grayson, State of Texas, on this day personally appeared T. L. Rankin, to me well known to be the same person named in and who signed the
107 above and foregoing instrument of writing as a party thereto, and acknowledged that he signed and delivered such instrument of writing for the considerations & purposes therein expressed of his own free will and accord.

In testimony whereof I hereto set my hand & official seal this 26th day of July, A. D. 1873.

[SEAL.] JNO. G. McELVANEY,
Notary Public, Grayson County, Texas.

STATE OF MISSOURI, }
County of Pettis, } *ss:*

I, J. D. Crawford, recorder of deeds within and for the county of Pettis and State aforesaid, do hereby certify that the above and foregoing instrument of writing was filed for record in my office on the 12th day of August, A. D. 1873, at 9 o'clock 15 m. a. m., and has been duly recorded in Miscellaneous Record A, on pages 109, 110, & 111.

Witness my hand and official seal, at office, in Sedalia, Pettis county, Missouri, the day and year aforesaid.

J. D. CRAWFORD, *Recorder,*
Per CHARLES ROLL, *D. R.*

Filed and certificate of corporate existence issued Sept. 29, 1874.
EUGENE F. WEIGEL,
Sec'y of State.

Plaintiff's Evidence in Rebuttal.

Testimony of J. R. Barrett.

J. R. BARRETT, being duly sworn, testified as follows:

The defendant Stevens was a director in the T. & A. Refrigerator Car Company from its organization until the 10th day of November, 1875, when an election took place and some one was elected in his place. He was in New York when I made the contract with the Wasson Manufacturing Company to build the refrigerator cars for

the T. & A. Ref. Car. Co. and knew about it. I conferred with him about that matter, and then went to Mass. and made the con-
108 tract. He knew as much about the business of the company as I did. I never did anything of importance without his consent. It was some considerable time after this that he said he would only take twenty shares in the Co. after that, and I only made a call of 50% on him on twenty shares. I did not want to have any trouble with him about his subscription to the stock of the company. He was the gen. manager of the M., K. & T. R'y at that time, and could have made it so that the T. & A. Ref. Car. Co. could not have done business or have made any money. I did not release him from his subscription for fifty shares. He said he would only pay for twenty shares $2,000, and he paid 50 % on twenty shares. I never released Stevens from his subscription, in writing or verbally, and never agreed to. I simply got all the money I could from him and left it for him and the company to settle as to the balance.

This was all the evidence introduced.

The defendants then requested the court to instruct the jury as follows, each of said instructions being separately presented and separate request made thereon.

Instructions Asked for by the Defendants.

1. The court instructs the jury that, on the pleading and evidence in this suit, the plaintiff is not entitled to recover, and they will find for the defendants.

2. If the jury believe from the evidence that the plaintiff instituted and prosecuted the suit on the notes described in the petition, in the circuit court of Pettis county, Missouri, and obtained judgment therein for the use and benefit of J. R. Barrett, then the plaintiff is not entitled to recover against the defendants or either of them, and they will find for the defendants.

3. If the jury believe from the evidence that the plaintiff
109 has a valid judgment against the Texas & Atlantic Refrigerator Car Co., then he cannot maintain this suit against the defendants, as two of the stockholders in said company alone, and they will find for the defendants.

4. If the jury believe from the evidence that J. R. Barrett was president of the Texas & Atlantic Refrigerator Car Co. at the time of making the notes described in plaintiff's petition; that he made them in the name of said company to himself and he and Joel Ellis endorsed them in blank, and said Barrett had them discounted at the Commercial Bank of St. Louis; that said Barrett afterwards paid off said notes to said bank; that he and the plaintiff agreed at the time that the plaintiff should give his note for $10,000 to said Barrett, and plaintiff should sue the Texas & Atlantic Refrigerator Car Co. on the notes paid off by said Barrett to said bank for the use and benefit of said Barrett; that said Barrett was at said time the president of said Texas & Atlantic Refrigerator Car Co. and so

continued as such president until the institution of this suit; that in pursuance of said agreement the plaintiff did institute suit on said notes on the 11th day of December, 1875, in the circuit court of Pettis county, Missouri, against the Texas & Atlantic Refrigerator Car Co. and the summons in said case was served on J. R. Barrett, as president of the Texas & Atlantic Refrigerator Car Co., and there was no appearance by said Texas & Atlantic Refrigerator Car Co. to said suit, but judgment was rendered against it by default for the amount of principal and interest of said notes, then said circuit court of Pettis county, Missouri, had no jurisdiction over the Texas & Atlantic Refrigerator Car Co., and said judgment by default was and is null and void, and they must find for the defendants.

110 5. J. R. Barrett, as payee and endorser of the notes discounted at the Commercial Bank of St. Louis was bound to pay said notes if protested for non-payment, and when he paid said notes to said bank they thereby became satisfied, and the plaintiff, not being either payee or endorser on said notes, had no right to sue on said notes in the circuit court of Pettis county, Missouri, and not being the owner of said notes at the time that he brought said suit, he had no right to take judgment thereon, and he has no right to maintain this suit, and they will find for the defendants.

6. The Texas and Atlantic Refrigerator Car Co. was not organized as a legal corporation until the articles of association were filed in the office of the secretary of state, to wit, on the 29th day of September, 1874.

If the jury believe from the evidence that after the defendant Stevens had signed the original subscription paper for fifty shares of stock in the Texas & Atlantic Refrigerator Car Co. the scheme of said company was changed without his consent; that after such change he notified the company, through its president, J. R. Barrett, that he would only take twenty shares of stock therein; that after said notice the company made a call of 50% on said twenty shares of stock on said Stevens and he paid said call; that after said company treated and acquiesced in said payment as a full payment of 50% on the stock taken by the defendant Stevens in said Company, then said company became estopped from claiming on said original subscription and said Stevens is only liable for 50% on twenty shares of said capital stock, and they will so find, provided they find for plaintiff.

7. If the jury believe from the evidence that the plaintiff is prosecuting this suit for the use and benefit of J. R. Barrett, the
111 president of the Texas & Atlantic Refrigerator Car Co.; that said Barrett, as president of said company, acquiesced in the defendant Stevens reducing his original subscription from fifty to twenty shares of stock in said company, then said Barrett cannot hold defendant Stevens for more than the unpaid balance on said twenty shares, and they will so find, provided they find a verdict for plaintiff.

The court refused to give said instructions and each of them. To this refusal of the court to give said instructions and each of them the defendants and each of them then and there duly excepted.

The court then, on its own motion, instructed and charged the jury as follows:

Charge to Jury.

April Term, 1885.

NICHOLS *vs.* REFRIGERATOR COMP'Y. } No. 1727.

Nichols, the plaintiff, sues the defendants, Stevens & Mirick, on account of stock subscriptions made by them to the refrigerator company. The plaintiff Nichols claims to be creditor of the company and, having failed to collect his debt because the company had no property, he sues the defendant stockholders on their unpaid subscriptions. It is claimed by plaintiff Nichols that he has a right to maintain this suit, which is denied by the defendants.

The law in Missouri is that the party in interest—that is, the person to whom the proceeds of the judgment, if any, is recovered will go—must bring the suit.

The purpose of this provision is that any unsettled matter which may exist between the parties suing and the party sued may
112 be settled in one suit.

The case before us illustrates the propriety of such a provision of law. If, for instance, Barrett is the real party in interest and had brought suit in his own name these defendants would be entitled to show that Barrett had paid himself out of the property of the company or had created a liability of the company by making extravagant charges for salary and traveling expenses—indeed, inquire into the whole of the transactions of the corporation, of which Barrett was chief officer and manager. Defendants cannot now do this because Nichols says I am a creditor and have nothing to do with what the corporation or its officers may have done. It is, therefore, necessary for you to determine whether Nichols or Barrett is the proper person to bring this suit. If you shall come to the conclusion from the testimony in the case that the notes upon which Nichols sued the refrigerator company in the Pettis circuit court had in fact been paid by Barrett to Nichols before the suit brought by him in the Pettis circuit court, or have been paid by Barrett to Nichols since that time and before he, Nichols, brought the present suit against the defendants, Stevens and Mirick, your verdict should be for the defendants. But, if you shall find from the testimony that Barrett only secured the payment of the notes to Nichols, and that he did not in fact pay them, in that case Nichols had the right to sue these defendants and recover judgment against them. As I cannot anticipate what conclusion you may arrive at on this branch of the case, I proceed to instruct you upon the defense set up by the defendant Stevens. It is shown by the testimony that

Stevens originally subscribed 5,000 dollars — stock, but it is claimed by him that this subscription was reduced to 2,000 dollars, on which he paid 1,000 dollars, leaving an unpaid balance on his sub-
113 scription of 1,000 dollars, instead of 4,000 doll's, as claimed by plaintiff Nichols. Stevens, after he had subscribed 5,000 doll's could not of his own accord reduce that subscription to 2,000 dollars. This would undoubtedly be the law if an unsecured creditor was suing the defendant Stevens for his claim ; but in this case Nichols at most is a secured creditor and can lose nothing in any event. The 1,000 dollars sought to be recovered under one view, as well as the 4,000 claimed under another view, will, under the testimony, go to Mr. Barrett. Now, if you shall find from the evidence that Mr. Barrett had power to release Mr. Stevens, and the board of directors consented to this release of Stevens from the 5,000 dollars subscription and claimed the 2,000 subscription only, such a release may justify you in finding a verdict for the unpaid balance on the 2,000 dollars subscription.

In order to determine as to whether you will hold Stevens for the larger or smaller subscription you may well look at the manner in which Mr. Barrett dealt with this corporation, what power he had, as well *as well* as what power he assumed, for this suit is for the benefit of Nichols. The change of " scheme " testified to cannot have the effect of releasing any of the parties from their liabilities on their subscription. It is claimed by defendants that they have certain equities against Barrett which by Nichols suing for Barrett they are prevented from setting up. In order to enable you to properly weigh this argument, you will recall to mind that the defendants had Barrett's deposition taken and he came upon the witness stand here. Under the opportunity thus given to show such equities, even to the extent of examining into the correctness of his dealings with the corporation, any failing to bring them out must be con-
114 sidered in weighing the argument of equities. If defendants had such we have a right to look for their being brought out at the time Barrett was testifying.

Under the law parties to a case are permitted to testify.

To this charge, as a whole, and to each particular part thereof, the defendants and — of them then and there duly excepted.

The jury then, on the 23d day of April, 1885, retired to consider of their verdict, and not being able to agree were discharged until the next day, when they, after some time spent in deliberating on their verdict, returned into court with the following verdict :

Verdict.

NICHOLS
vs.
TEXAS & ATLANTIC REF. CAR CO. *et al.* } 1727.

We, the jury, find for the plaintiff as against Henry D. Mirick in the sum of $627.41, and also in favor of plaintiff as against R. S. Stevens in the sum of $5,027.33.

L. McCUBBIN, *Foreman.*

Afterwards, to wit, on the 28th day of April, 1885, the defendants filed a motion to set aside said verdict and the judgment rendered thereon, and to grant a new trial; which motion is in words and figures as follows:

Motion to Set Aside Verdict & Grant a New Trial.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri. April Term, 1885.

WILLIAM NICHOLS, Plaintiff,
vs.
THE TEXAS & ATLANTIC REFRIGERATOR CAR CO. and ROBERT S. STEVENS and HENRY D. MIRICK, Defendants.

Now, this day, come the defendants, Stevens and Mirick, and move the court to set aside the verdict of the jury rendered in the above-entitled cause and the judgment entered on said verdict against each of them, and grant a new trial therein for the follow-
115 ing reasons, viz:

1st, because the court on the trial of said cause admitted illegal, irrelevant, and improper evidence on the part of the plaintiff; 2d, because the court erred in not sustaining defendants' demurrer to plaintiff's evidence when the plaintiff closed his case; 3d, because the jury found said verdict contrary to evidence; 4th, because the jury found said verdict without evidence; 5th, because the court erred in its charge to the jury; 6th, because the court erred in not charging the jury as requested by the defendants; 7th, because the court erred in not granting each request to charge the jury as made by the defendants; 8th, because the jury found for the plaintiff when they should have found for the defendants.

JAMES CARR,
Attorney for Defendants.

And afterwards, to wit, on the 30th day of April, 1885, defendants filed a motion to arrest the judgment rendered in said cause; which motion is in words and figures as follows:

Motion in Arrest of Judgment.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri. April term, 1885.

WILLIAM NICHOLS, Plaintiff,
vs.
THE TEXAS AND ATLANTIC REFRIGERATOR CAR COMPANY and Others, Defendants. } No. 1727.

Now, at this day, come the defendants, Robert S. Stevens and Henry D. Mirick, and move the court to arrest the judgment in the above-entitled cause for the following reasons, viz:

1. Because the facts alleged in the plaintiff's petition do not constitute any cause of action against said defendants, Stevens and Mirick.

2. Because there is no privity of contract between the plain-
116 tiff as a judgment creditor of the Texas and Atlantic Refrigerator Car Company and the defendants, Stevens and Mirick, as stockholders therein, and the plaintiff, as such judgment creditor, cannot maintain this action at law on his judgment against the said Texas and Atlantic Refrigerator Car Company to recover against said defendants the balance remaining unpaid on their subscription to the capital stock of said company.

3. Because this court in an action at law has no jurisdiction over the subject-matter of said action to render a judgment therein for the plaintiff and against said defendants for the amount found by the verdict of the jury or for any amount at all.

4. Because this court, sitting only as a court of equity, has jurisdiction to render a judgment for the plaintiff on the judgment described in his petition without suing as well for himself as for all other creditors of the Texas and Atlantic Refrigerator Car Company and making all stockholders in said company who have not fully paid up their stock therein parties defendant to such suit.

5. Because all the necessary parties defendant are not before this court to authorize it to render judgment for the plaintiff on the judgment described in his petition.

JAMES CARR,
Att'y for Def'ts, Stevens and Mirick.

And afterwards, to wit, on the 12th day of September, 1885, and during the April term, 1885, of said court, the court, after having heard the arguments of counsel for the plaintiff as well as for the defendants on said motion for a new trial and having fully considered said motion, overruled it; to this decision of the court in overruling said motion the defendants and each of them then and there duly excepted.

117 Afterwards, to wit, on the 12th day of September, 1885, the court, after hearing arguments of counsel for the plaintiff as well as the defendants on said motion in arrest of judgment and having fully considered said motion in arrest of judgment, overruled it; to this decision of the court in overruling said motion the defendants and each of them then and there duly excepted.

And forasmuch as the foregoing decisions and rulings of the court in said cause do not appear of record the defendants and each of them for himself files this their joint and several bill of exceptions, and they and each of them pray that the same may be allowed, signed, sealed, and made a part of the record in this cause, which is done accordingly this 12th day of September, 1885.

A. KREKEL. [SEAL.]

And afterwards, on said last-mentioned day, viz., Saturday, the 12th day of September, 1885, the following further proceedings were had in said cause, to wit:

Writ of Error Allowed. Citation Signed. Bond Approved. Supersedeas Granted.

WM. NICHOLS
vs.
TEXAS & ATLANTIC REF. CAR CO. *et al.* } 1727.

This day comes the defendant, Robert S. Stevens, by his attorney, James Carr, Esq., and presents to the court a writ of error to reverse the judgment herein, a citation directed to the plaintiff, and an appeal bond in the sum of ten thousand one hundred dollars. Whereupon said writ is allowed, said citation signed, and said bond approved and ordered to be made part of the record herein.

It is further ordered that a supersedeas be granted staying all further proceedings upon the judgment against said defendant Stevens until the decision on the writ of error herein by the
118 Supreme Court of the United States.

And said appeal bond so filed as aforesaid is in the words and figures as follows, to wit:

Appeal Bond.

Know all men by these presents that we, Robert S. Stevens and Henry D. Mirick, John Scullin, are held and firmly bound unto William Nichols in the full and just sum of ten thousand one hundred dollars, to be paid to the said William Nichols, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at the April term, 1885, of the circuit court of the United States for the eastern division of the western district of Missouri, in a suit depending in said court between William Nichols, plaintiff, and The Texas and Atlantic Refrigerator Car Company, Robert S. Stevens, & Henry D. Mirick, defendants, judgment was rendered against the said Robert S. Stevens for the sum of five thousand twenty-seven and $\frac{33}{100}$ dollars, and the said Robert S. Stevens having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said William Nichols, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Robert S. Stevens shall prosecute said writ to effect and answer all

damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and
119 virtue.

Sealed and delivered in presence of—

ROBERT S. STEVENS. [SEAL.]
HENRY D. MIRICK. [SEAL.]
JOHN SCULLIN. [SEAL.]

Approved by—
A. KREKEL, *Judge.*

The surety on the within bond is satisfactory.
GEO. P. B. JACKSON,
Att'y for Pl'tff.

120 UNITED STATES OF AMERICA, } *sct:*
Eastern Division of the Western District of Missouri, }

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for said district, do hereby certify that the foregoing writing is a true transcript of the record and proceedings in case No. 1727, of Wm. Nichols *vs.* Texas & Atlantic Refrigerator Car Co. *et al.*, as fully as the same remain on file and of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the city of Jefferson, in said district, this 13th day of October, 1885.

{Seal of the United States Circuit Court for the Western District of Missouri, Eastern Division.}

H. C. GEISBERG, *Clerk.*

121 [Endorsed:] No. 1727. U. S. circuit court, western district of Missouri, eastern division. Wm. Nichols *vs.* Texas & Atlantic Ref. Car Co. *et al.* Duly certified copy of the transcript of the record and proceedings in the above-entitled cause.

Endorsed on cover: W. Missouri C. C. U. S. No. 465. Robert S. Stevens, plaintiff in error, *vs.* William Nichols. Filed October 28, 1885.

Supreme Court, U.S.
FILED
JAN 15 1889
JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 190.

ROBERT S. STEVENS, Plaintiff in Error,

vs.

WILLIAM NICHOLS.

Error to the Circuit Court of the United States for the Western District of Missouri.

Brief for Plaintiff in Error.

A. H. GARLAND and
JAMES CARR,
Attorneys for Plaintiff.

Thomas McGill & Co., Printers, Washington, D. C.

damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and
119 virtue.

Sealed and delivered in presence of—

ROBERT S. STEVENS. [SEAL.]
HENRY D. MIRICK. [SEAL.]
JOHN SCULLIN. [SEAL.]

Approved by—
A. KREKEL, *Judge.*

The surety on the within bond is satisfactory.
GEO. P. B. JACKSON,
Att'y for Pl'ff.

120 UNITED STATES OF AMERICA, } *sct:*
Eastern Division of the Western District of Missouri, }

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for said district, do hereby certify that the foregoing writing is a true transcript of the record and proceedings in case No. 1727, of Wm. Nichols *vs.* Texas & Atlantic Refrigerator Car Co. *et al.*, as fully as the same remain on file and of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the city of Jefferson, in said district, this 13th day of October, 1885.

{ Seal of the United States Circuit Court for the Western District of Missouri, Eastern Division. }

H. C. GEISBERG, *Clerk.*

121 [Endorsed:] No. 1727. U. S. circuit court, western district of Missouri, eastern division. Wm. Nichols *vs.* Texas & Atlantic Ref. Car Co. *et al.* Duly certified copy of the transcript of the record and proceedings in the above-entitled cause.

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Brief for Plaintiff in Error.

A. H. GARLAND and
JAMES CARR,
Attorneys for Plaintiff.

Thomas McGill & Co., Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM 1888.

ROBERT S. STEVENS, Plaintiff in Error,
vs.
WILLIAM NICHOLS. } No. 190.

Error to the Circuit Court of the United States for the Western District of Missouri.

Brief for Plaintiff in Error.

On the 25th day of January, 1881, William Nichols commenced suit in the Circuit Court of Pettis county, Missouri, against the Texas and Atlantic Refrigerator Car Company and Robert S. Stevens and Henry D. Mirick, as stockholders in such company, to recover the amount of their unpaid stock.

Nichols alleged, in substance, after stating the organization of the company and its place of business—

That on the 6th day of May, 1875, the Texas and Atlantic Refrigerator Car Company, by its President, executed and delivered its promissory note, dated that day, to J. R. Barrett, whereby it promised, for value received, to pay three months after the date thereof to the order of J. R. Barrett, at the Commercial Bank of St. Louis, the sum of $5,800, which note was afterwards by said Barrett indorsed and delivered to plaintiff

for a valuable consideration; also another note, dated May 14th, 1875, for $4,200, of the same tenor and indorsed the same way.

That default having been made in the payment of both of these notes, Nichols brought suit upon them in the Circuit Court of Pettis county, Missouri, on December 11th, 1875, against the corporation, and on the 26th day of January, 1876, recovered judgment for the sum of $10,377.21, with 10 per cent. interest per annum, and for his costs, taxed at $6.75.

Execution was issued on this judgment on the 31st of January, 1876, and, after paying the costs, the sum of $12 was realized, and the execution was returned not satisfied as to the balance of the judgment.

Robert S. Stevens is a stockholder in this corporation, and has been ever since the 1st day of May, 1875, to the amount of $5,000, upon which he had paid to said corporation the sum of $1,000, and that the balance of said stock is due and unpaid.

Henry D. Mirick is a stockholder in said corporation, and has been ever since the 1st day of May, 1875, to the amount of $1,000, upon which he had paid to the corporation the sum of $500, and that the balance of the stock is due and unpaid; that Stevens and Mirick are liable for the respective sums remaining unpaid on their stock, and that he (Nichols) is entitled to have the same applied upon his judgment against the corporation.

And he prayed that he recover *judgment*, ordering the said respective amounts due by said Stevens and Mirick to said corporation to be applied on his said judgment, and that he recover of said R. S. Stevens the sum of $4,000, with 5 per cent. per annum interest thereon from the 7th day of March, 1878; and that he recover of said H. D. Mirick the sum of $500, with 5 per cent. per annum interest thereon from the 7th day of March, 1876, and for all proper relief. (Rec., 3.)

The case having been removed from the State Court to the Circuit Court of the United States, &c., Stevens and Mirick appeared and answered by denying each and every material allegation in the complaint, and set up two special defences, viz.:

That the pretended judgment was recovered on two promissory notes executed by the Texas and Atlantic Refrigerator Car Company by its president, J. R. Barrett, to himself as payee, and indorsed in blank by him, as alleged by plaintiff in his suit against said Texas and Atlantic Refrigerator Car Company in the Circuit Court of Pettis county, Missouri; that the notes were not paid at maturity; that prior to the institution of the suit and after the maturity of the notes, to wit, on the 25th day of November, 1875, said J. R. Barrett, the payee and indorser on said notes, paid off and fully satisfied said notes to the Commercial Bank of St. Louis, the owner and holder thereof at the time of said payment and satisfaction; that plaintiff, at the time of the commencement of such suit, had no title, right, interest, or claim in or to the notes, or either of them, and he had none at the time of the rendition of the judgment, and he has no title, right, interest, or claim in or to said judgment now; that he instituted and prosecuted said suit in his own name to final judgment for the exclusive use and benefit of said J. R. Barrett, in pursuance of an illegal and corrupt agreement between plaintiff and said Barrett; that Barrett is the real party in interest; that said suit was so instituted and prosecuted to final judgment in the name of the plaintiff with the intent and for the purpose of unjustly, improperly, and illegally coercing money by this proceeding out of these defendants as stockholders in said Texas and Atlantic Refrigerator Car Company, when they did not owe any money to such company; and with the intent and for the purpose of preventing the defendants, as stockholders, from set-

ting up certain equitable defenses and equities existing between Barrett, as president of said Texas and Atlantic Refrigerator Car Company, and the defendants, as stockholders therein, and which equities, if set up in a direct suit between Barrett and the defendants, would be a full and complete bar to any suit which Barrett could institute against these defendants for or on account of the payment of the notes by Barrett to the Commercial Bank of St. Louis, as aforesaid. (Rec., 11, *et seq.*)

Second. For a further defense to said pretended judgment defendants state that plaintiff obtained and procured it by fraud. (Rec.)

The plaintiff demurred to this answer, which was overruled. (Rec., 13, 14.)

He then filed a reply, joining issue on the material allegations in said answer, and setting up *res judicata* as to plaintiff's judgment, recovered on the notes in the Circuit Court of Pettis county, Missouri.

On the trial the plaintiff offered to read in evidence a duly certified copy of the record in the case of William Nichols, plaintiff, against the Texas and Atlantic Refrigerator Car Company, defendant, in the Circuit Court of Pettis county, Missouri. The defendants Stevens and Mirick objected to the reading of said copy in evidence for the following reasons:

First. Because the court had no jurisdiction over the subject-matter of this suit.

Second. Because the defendants were not parties to the judgment sued on, and said judgment was not legally admissible in evidence against them as the foundation of plaintiff's claim against them.

Third. Because J. R. Barrett was the owner of the notes upon which said judgment was recovered, and president of the Texas and Atlantic Refrigerator Car Company, the maker of said notes, at the time said suit was brought on the notes, and suit was brought by

plaintiff. The summons was served on him as president of the Texas and Attantic Refrigerator Car Company, and it never appeared to said suit or in any way waived the service of said summons, and the judgment was rendered by default, and was and is null and void.

Fourth. Because said record is incompetent evidence against these defendants for any purpose, except to show that plaintiff had recovered judgment against the Texas and Atlantic Refrigerator Car Company and an execution had been issued thereon and returned *nulla bona.*

The court overruled the objections, and allowed the copy of the record to be read in evidence. To this ruling of the court the defendants duly excepted. (Rec., 21, 22.)

This copy of the judgment shows that on the 11th day of December, 1875, the plaintiff commenced suit in the Circuit Court of Pettis county, Missouri, on the notes, against the Texas and Atlantic Refrigerator Car Company alone, (J. R. Barrett, the indorser, not being sued, although he was living in the county and within the jurisdiction of the court.)

A summons was issued the same day to the sheriff of said county, returnable on the first Monday in January, 1876, and was by him served the same day on J. R. Barrett, president of the Texas and Atlantic Refrigerator Car Company. No appearance was ever made or defense set up to this suit. (Rec., 25.) On the 26th day of January, 1876, a judgment by default was taken for $10,377.21, the full amount of principal and interest on the notes. On the 31st day of January, 1876, an execution was issued on said judgment to the sheriff of Pettis county, Missouri, who levied it upon an undivided half interest of an ice-house as the property of the Texas and Atlantic Refrigerator Car Company, and he advertised and sold said interest to J. R. Barrett for

$25, and after deducting the costs, $13, credited the judgment with $12, and returned the execution *nulla bona* as to the balance of the judgment. (Rec., 26, 27.)

Plaintiff next read in evidence the receipt of H. D Mirick, dated August 11th, 1874, for ten shares of stock, upon which $500 had been paid. (Rec., 28,)

Plaintiff next read in evidence a subscription paper, dated July —, 1873, with R. S. Stevens' name on it for fifty shares in the Texas and Atlantic Refrigerator Car Company. (Rec., 28.)

Plaintiff next read in evidence from the stub book of the Texas and Atlantic Refrigerator Car Company, containing receipts given by stockholders for stock, showing certificate No. 8, for twenty shares of stock issued to R. S. Stevens, August 1st, 1874, upon which $1,000 had been paid; but the receipt of said certificate was not acknowledged by Stevens. (Rec., 29.)

This being all the evidence introduced by plaintiff, the defendants, Stevens and Mirick, requested the court to instruct the jury that the same is insufficient in law to base a verdict for the plaintiff, and to find for the defendants.

The court refused to give such instruction, and the defendants duly excepted. (Rec., 29.) The defendants read in evidence the articles of association of the Texas and Atlantic Refrigerator Car Company. (Rec., 72, 73.)

The amount of the capital stock of the Texas and Atlantic Refrigerator Car Company was $100,000, of $100 each. The business of the company was to be conducted by five directors, consisting of J. R. Barrett, F. A. Hyatt, T. L. Rankin, R. S. Stevens, and W. P. Robinson. The headquarters and general business office of the company was at Sedalia, Pettis County, Missouri. The object of the company was to slaughter beeves and ship the beef from Denison, Texas, to New

York in refrigerator cars. The articles of association are dated July 23d, 1873, but the certificate of corporate existence was not issued by the Secretary of State until September the 29th, 1874.

The defendants next read in evidence the deposition of the plaintiff, Nichols. He testified, in substance, that he knew J. R. Barrett; that he lived at Sedalia, Mo.; that he was president of the Texas and Atlantic Refrigerator Car Company on the 6th of May, 1875, and for a long time thereafter, and may be yet.

Nichols further testified that he was cashier of the Commercial Bank of St. Louis; that he does not know what year he ceased to be cashier; that he was elected president the year Lewis died, and he is now president. Being asked if he ever owned the notes upon which the judgment by default was rendered, he said: "I don't know. I had a heap of notes. I don't know whether I owned them or not. I couldn't tell till I saw them." (Rec., 29, 30.)

Being asked if said notes were ever paid by any person, he said: "I don't know which notes you allude to; the company had a great many notes out, and I can't tell whether these particular notes were paid or not." (Rec., 31.)

After being questioned closely several times and giving indefinite answers, he finally made answer to this direct question, viz.: "Has J. R. Barrett any interest in this suit, or is this suit prosecuted in your name for his use and benefit? A. Yes. Q. Which do you mean.? A. It is prosecuted for his use and benefit. Q. Have you any interest in this suit? A. I can tell you how the the case stands. Mr. Barrett and the Refrigerator Car Company both owed the bank and myself a large amount of money. It was the company's debt, and Barrett was indorser for it. I was anxious to get it paid, and in order to get the money I agreed to prose-

cute this suit against the stockholders of the Refrigerator crowd—the car company. They are all the same thing. I agreed with J. R. Barrett to do this. Mr. Barrett mortgaged his property and paid us the debt due." (Rec., 34.)

On cross-examination he reiterated the same facts and adds:

"I sent the notes to Philips & Vest to have suit brought on them, and at the same time I had received from Mr. Barrett the amount of the notes in cash. I gave Mr. Barrett my due-bill for $10,000 for the amount represented by the notes which I did not surrender, and those notes which I sent to Philips & Vest for suit would have been cancelled by reason of the receipt of that amount of money had it not been for the contract that I was to prosecute the suit. Barrett still holds my due-bill. I did this for the purpose of aiding Mr. Barrett as a friend in getting his money out of the notes." (Rec., 30, 37.)

Defendants next read J. R. Barrett's deposition in evidence. He fully corroborated Nichols in his statement about entering into the contract with Nichols to furnish him with $10,000 to pay off the notes upon which Nichols obtained the judgment by default, and then Nichols gave Barrett his note or due-bill for an equal amount ($10,000) and agreed to bring suit in his name on the two notes in question against the Texas and Atlantic Refrigerator Car Company and obtain judgment for the use and benefit of Barrett. (Rec., 39, 41.)

Barrett testified further:

"The notes upon which the judgment was rendered were given to the Commercial Bank of St. Louis. The reason why I loaned plaintiff the money, I was security on the notes and they could collect them easier than I. I thought it was the easiest way to collect them." (Rec., 40, 41.)

On cross-examination he reiterates the same facts more fully and says:

"In the event that Mr. Nichols fails to recover anything on the two notes on which he sued, he is entitled, under my agreement with him, to still hold me liable on said notes, and he will be entitled to use them in payment of the note I hold against him; and if he recovers only a part of it, he will, under that arrangement, hold me liable for the amount uncollected and apply it in payment of the note I hold against him. There was no purpose to cover up anything in having the suit brought by Nichols. I was advised that judgment could be obtained quicker by having the suit brought by Mr. Nichols than if I had paid him off and brought suit in my own name." (Rec., 47.)

Barrett testified that between the 9th day of April, 1875, and the 22d day of May following he had given bills of exchange and promissory notes in the name of the Texas and Atlantic Refrigerator Car Company to the aggregate amount of $34,000. That on the 31st day of May, 1875, he, as president of the company, had executed a deed of trust to W. R. Johnson, as trustee, on all the real estate and leasehold of the company at Denison, Texas, to secure a bill of exchange and three notes of the company held by the Commercial Bank of St. Louis, amounting to the sum of $20,000—the two notes in question being in the number, and a note held by the plaintiff, Nichols, for $2,500, dated May the 22d, 1875. This was the last note issued. (Rec., 39, 40. Deed of Trust, p. 59, *ibid.*)

Barrett and Joel Ellis were indorsers on all of this paper. The note for $4,200 was never protested so as to fix the liability of the indorsers thereon. Barrett testified that he did not know why this note was not protested. (Rec., 39.)

Joel Ellis had taken $25,000 stock in the company and paid for it by conveying to A. D. Jaynes, as trustee

for the company, an undivided third interest in eighteen acres of land in or near Chicago Cook county, Illinois. Barrett got Jaynes, as trustee, on the 1st day of June, 1875, to execute a deed of trust on this land to A. S. Osgood, as trustee, to secure three bills of exchange and two notes, Nichols' note for $2,500 being one of the notes. (Rec., 39, 40.)

On the 1st day of September, 1875, Barrett, as president of the Texas and Atlantic Refrigerator Car Company, executed another deed of trust to W. R. Johnson, as trustee, on all the tools, fixtures, and personal property in and belonging to the slaughter-house and yards in Denison, Texas; also on fifty refrigerator cars belonging to the Texas and Atlantic Refrigerator Car Company, to secure the same bill of exchange, and notes secured by the deed of trust executed on the 31st day of May, 1875, this being the third deed of trust given to secure Nichols in the payment of his note for $2,500; and the second deed of trust to secure the notes upon which the judgment by default was rendered. (Rec., 40, 65.) This was all the property belonging to the Texas and Atlantic Refrigerator Car Company, except the undivided half interest in the ice-house in Sedalia, sold on plaintiff's execution for $25 to J. R. Barrett, as hereinbefore stated.

Barrett was asked if he had any authority from the Board of Directors to make the three deeds of trust hereinbefore described. He said he had. That it was given by resolution on the 29th day of May, 1875, at a called meeting of the Board, at Denison, Texas, at which himself, F. A. Hyatt, and T. L. Rankin were present. He was requested to annex a copy of the resolution to his deposition, to be marked "Exhibit A." His answer was "the book containing the record of the proceedings of the Board of Directors is lost, and I can't furnish the copy called for. It was ratified at the stock-

holders' meeting in November, 1875." (Rec., 44, 45.)

No by-law was shown authorizing the president to call a special meeting of the directors, and no notice was given to the other two directors of the meeting held at Denison, Texas.

All the property in the two deeds of trust—*i. e.*, the deeds of trust dated, respectively, May the 31st, 1875, and September the 1st, 1875, were advertised for sale on the 13th of November, 1875, at Denison, Texas, and bid in by Nichols' attorney in Nichols' name, Nichols not being there, but Barrett was.

He thinks there were several persons at the sale; does not think that Nichols was at the sale. Only about half a dozen of the refrigerator cars were at Denison at the time of the sale. The balance of the fifty were on the road somewhere. (Rec., 42.)

The fifty refrigerator cars cost about $1,400 a piece. At the time of the sale there was a vendor's lien on them for $28,000. The real estate sold for $2,000; the fixtures, &c., for $1,000, and the company's equity in the refrigerator cars for $500.

The company's third interest in the eighteen acres of land in Chicago was sold to Nichols on the 18th of June, 1877, for $5,000. (Rec.. 42, 43.)

None of the money realized from the sale of all the property embraced in the two deeds of trust dated, respectively, May the 31st, 1875, and September the 1st, 1875, was ever credited on the two notes upon which judgment by default was rendered, although they were equally secured with the bill of exchange and the other notes described in said deeds of trust. (Rec., 45.)

The slaughter-house at Denison, Texas, was insured, and burnt down October 18th, 1878. (Rec., 59.) Under the contract between Nichols and Barrett the insurance money, $4,400, was paid to Barrett. (Rec., 44.) The fifty refrigerator cars were sold to the M. K. & T. R'y

Co. for $30,000, six hundred of which was to be paid monthly until the whole amount was paid, with interest on the deferred payments at 7 per cent. per annum. At the time of the sale there was due on the cars to the Wasson Manufacturing Company about $22,000. The difference between the $28,000 indebtedness and the $22,000 indebtedness had been paid by Barrett and Nichols in the interval between the purchase by Nichols at the sale under the deed of trust on the 13th day of November, 1875, and the sale to the M. K. & T. R'y Co. The Wasson Manufacturing Company transferred its lien on the cars to the Agawam Bank, and it took the obligations of the M. K. & T. R'y Co. for $30,000. The bank then loaned Barrett $8,000 and took his note for the amount loaned, and when the M. K. & T. R'y Co. paid the full amount of the purchase-money the Agawam Bank returned Barrett his note, Barrett thus realizing $8,000 from the sale of the refrigerator cars. One hundred and fifty dollars was realized from the sale of the real estate at Denison. Barrett has realized through the sale of the property on the 13th day of November, 1875, $12,550, less the expenses of collecting it, and Nichols still holds the title to the third interest in the eighteen acres of land in Chicago. (Rec., 43, 44, 47, 48.)

Barrett testified on his cross-examination that he had authority from the directors to execute the notes negotiated to the Commercial Bank of St. Louis and Nichols and he produced two original resolutions without any date, marked Exhibit B, as his authority. (Rec., 51.) He testified that these resolutions were afterwards entered on the record book. (Rec., 46.) He also produced original exhibits from C to P, inclusive, in regard to the calling of a stockholders' meeting on the 10th of November, 1875, by John Montgomery and J. C. Thompson, two stockholders. That said meeting

had adopted a series of resolutions prepared by Barrett's attorneys ratifying everything that had been done by Barrett as president and *de facto* secretary and treasurer. (Rec., 48, 51, 57, and Mirick's deposition, p. 71.)

Barrett testified that, "By reason of the loss of the record book, as before explained, (Rec., 44 and 45,) it can't be produced." (Rec., 48.)

In obedience to a resolution of the Board of Directors adopted on the 11th of March, 1875, Barrett made a call on Stevens of 50 per cent. on twenty shares of stock upon which he had paid 50 per cent.; and he requested Stevens to "forward to me as president of the company, at Sedalia, Mo., on or before June the 7th, 1875, $1,000, being the amount due, and I will return you a certificate of full paid-up stock." This call is Exhibit T, dated May 13th, 1875. (Rec., 58.)

The general offices of the M. K. & T. Railway Company were at Sedalia, Mo., the same place as the general office of the Texas and Atlantic Refrigerator Car Company. R. S. Stevens was the general manager of the railway. H. D. Mirick was in the employ of the railway company. The M. K. & T. Railway extended from Denison, Texas, *via* Sedalia, Mo., to Hannibal. The scheme upon which Stevens went in, as one of the organizers of the Texas and Atlantic Refrigerator Car Company, was as follows:

TESTIMONY OF H. D. MIRICK, (Rec., 70 *et seq.*)

"When the Texas and Atlantic Refrigerator Car Company was organized, the defendant, Stevens, proposed that it should be done on the following scheme: The company was to slaughter beeves at Denison, Texas, and transport the meat fresh in refrigerator cars from Denison, Texas, to New York City, for sale there, over the M. K. & T. Railway, the Wabash Railway, the Lake Shore, and the Erie Railway, each of said railroads to furnish a certain number of box cars, which

were to be changed into refrigerator cars. The change could be made at small expense to the refrigerator car company. This would require only a small capital to commence business. J. R. Barrett, the president, agreed to the scheme, and promised to carry it out. He went to New York in September following (September, 1873) to make arrangements to carry out this scheme, but when he got there and presented his scheme to different persons, they said he ought to have his own refrigerator cars, and he got puffed up and went to Springfield, Mass., and made arrangements with the Wasson Manufacturing Company to build one hundred refrigerator cars, instead of getting the railroad company to furnish box cars, and having them changed to refrigerator cars. This put the refrigerator car company in debt $100,000. When Barrett returned to Sedalia, and informed Stevens of what he had done, Stevens at once told him he would not take 50 shares in the Texas and Atlantic Refrigerator Car Company with any such arrangement, but said he was willing to take 20 shares to encourage the enterprise. Barrett then agreed that Stevens' subscription should be reduced from 50 to 20 shares, and a call of 50 per cent. on the stock was made and, and Stevens' call was upon 20 shares, which he paid, and was regarded and treated as a holder of only 20 shares of stock in the T. & A. Ref. Car Company. Barrett talked with Stevens about the affairs of the company frequently. There were very few meetings of the Board of Directors. Barrett acted as president, secretary, treasurer, and everything else ; in fact he was the company. He called a stockholders' meeting on the 10th of November, 1875, to ratify his acts as president. He held a large number of shares of stock, and friends of his held proxies of most of the other stockholders at the meeting. I was present at this meeting as a stockholder myself. Stevens was not there. Barret got Messrs. Philips and Vest, as his attorneys, to prepare a series of resolutions ratifying everything that he had done. He presented these resolutions to the stockholders' meeting. I opposed and voted against them in the meeting, but he and his friends carried the resolutions by a large majority. Those who held these proxies were all under his control and influence. I

made a motion at the stockholders' meeting to have a committee of stockholders appointed to investigate the books and accounts of the T. & A. Ref. Car Company and report at an adjourned meeting on the 11th of December. The committee was appointed, but I was not put on it, and the meeting never was held and the committee never reported. If Barrett had managed the business of the company properly it would have made money, and it would not have got in debt. Barrett charged a very high salary, $5,000 a year, for managing the business of the company. It was too much for a man of his business capacity. It was much higher than the small corporations were then paying for managing their business. In addition to his salary he charged all his traveling expenses when away on the business of the company, and he traveled a great deal, and his traveling expenses—his charges against the company for his traveling expenses—were very large. I have applied to him to let me see the books of the company, but he says they are lost and cannot be produced, and I have never been able to see the books. I was present in Sedalia and heard Stevens frequently talk to Barrett about the business of the company. I was present when Barrett returned from New York and informed Stevens that he had contracted with the Wasson Manufacturing Company to build 100 new refrigerator cars for the T. & A. Ref. Car Company, and Stevens disapproved of the contract and Barrett's action in making it. Stevens said it was contrary to the scheme on which he had subscribed fifty shares to the capital stock of the T. & A. Ref. Car Company, and he would not take fifty shares in it since the scheme upon which the company had been gotten up had been changed. He said he would only take twenty shares in it. Barrett then said the Company would not hold Stevens for fifty shares, but only for twenty shares."

Barrett testified in rebuttal, in substance, that Stevens knew about his making the contract with the Wasson Manufacturing Company to build refrigerator cars for the T. & A. Ref. Car Company; that he conferred with Stevens about the matter and then went to

Massachusetts and made the contract ; that it was some considerable time after that that Stevens said he would only take twenty shares in the company. After that he only made a call of fifty per cent. on him on twenty shares. That he did not want to have any trouble with Stevens about his subscription to the stock of the company. Stevens was then general manager of the M. K. & T. Railway. That he never released Stevens from his subscription for fifty shares. That Stevens said he would only pay for twenty shares, $2,000, and he paid fifty per cent. on twenty shares. (R., 74, 75.)

The deeds of trust and the deeds made by the trustee are on pages 59 to 69, Record.

This was all the evidence.

The defendants then requested the court to instruct the jury as follows, each of said instructions being separately presented and a separate request made thereon.

1. The court instructs the jury that, on the pleadings and evidence in this suit, the plaintiff is not entitled to recover, and they will find for the defendants.

2. If the jury believe, from the evidence, that the plaintiff instituted and prosecuted the suit on the notes described in the petition, in the Circuit Court of Pettis county, Missouri, and obtained judgment therein for the use and benefit of J. R. Barrett, then the plaintiff is not entitled to recover against the defendants, or either of them, and they will find for the defendants.

3. If the jury believe, from the evidence, that the plaintiff has a valid judgment against the Texas and Atlantic Refrigerator Car Company, then he cannot maintain this suit against the defendants, as two of the stockholders in said company alone, and they will find for the defendants.

4. If the jury believe, from the evidence, that J. R. Barrett was president of the Texas and Atlantic Re-

frigerator Car Company at the time of making the notes described in plaintiff's petition; that he made them in the name of the said company to himself, and he and Joel Ellis indorsed them in blank, and said Barrett had them discounted at the Commercial Bank of St. Louis; that said Barrett afterwards paid off said notes to said bank; that he and the plaintiff agree at the time that the plaintiff should give his note for $10,000 to said Barrett, and the plaintiff should sue the Texas and Atlantic Refrigerator Car Company on the notes paid off by said Barrett to said bank for the use and benefit of said Barrett; that said Barrett was at said time the president of said Texas and Atlantic Refrigerator Car Company, and so continued as such president until the institution of this suit; that, in pursuance of said agreement, the plaintiff did institute suit on said notes on the 11th day of December, 1875, in the Circuit Court of Pettis county, Missouri, against the Texas and Atlantic Refrigerator Car Company, and the summons in said case was served on J. R. Barrett, as president of the Texas and Atlantic Refrigerator Car Company, and there was no appearance by said Texas and Atlantic Refrigerator Car Company to said suit, but judgment was rendered against it by default for the amount of principal and interest of said notes,—then said Circuit Court, of Pettis County, Missouri, had no jurisdiction over the Texas and Atlantic Refrigerator Car Company, and said judgment by default was and is null and void, and they must find for the defendants.

5. J. R. Barrett, as payee and indorser of the notes discounted at the Commercial Bank of St. Louis, was bound to pay said notes if protested for non-payment, and when he paid said notes to said bank they thereby became satisfied, and the plaintiff, not being either payee or indorser on said notes, had no right to sue on said notes in the Circuit Court of Pettis county, Mis-

souri, and not being the owner of said notes at the time that he brought said suit, he had no right to take judgment thereon, and he has no right to maintain this suit, and they will find for the defendants.

6. The Texas and Atlantic Refrigerator Car Company was not organized as a legal corporation until the articles of association were filed in the office of the Secretary of State, to wit, on the 29th day of September, 1874.

If the jury believe from the evidence that after the defendant Stevens had signed the original subscription paper for fifty shares of stock in the Texas and Atlantic Refrigerator Car Company, the scheme of said company was changed without his consent; that after such change he notified the company, through its president, J. R. Barrett, that he would only take twenty shares of stock therein; that after said notice the company made a call of 50 per cent. on said twenty shares of stock on said Stevens and he paid said call; that after that said company treated and acquiesced in said payment as a full payment of 50 per cent. on the stock taken by defendant Stevens in said company,—then said company became estopped from claiming on said original subscription, and said Stevens is only liable for 50 per cent. on twenty shares of said capital stock, and they will so find, provided they find for plaintiff.

7. If the jury believe from the evidence that the plaintiff is prosecuting this suit for the use and benefit of J. R. Barrett, the president of the Texas and Atlantic Refrigerator Car Company; that said Barrett, as president of said company, acquiesced in the defendant Stevens reducing his original subscription from fifty to twenty shares of stock in said company, then said Barrett cannot hold defendant Stevens for more than the unpaid balance on said twenty shares, and they will so find, provided they find a verdict for plaintiff. (Rec., 75, 76.)

The court refused to give any of these instructions and the defendants duly excepted. (Rec., 77.)

The court then charged the jury the converse of the foregoing instructions. (Rec., 77, 78.)

Under the charge of the court the jury found a verdict against Stevens for the whole amount sued for, $5,027.33, and judgment was rendered accordingly.

In due time a motion for a new trial was filed assigning the usual grounds therefor. (Rec., 79.) And on the 30th of April, 1885, a motion in arrest of judgment was filed, assigning the following grounds, viz.:

1. Because the facts alleged in the plaintiff's petition do not constitute any cause of action against said defendants, Stevens and Mirick.

2. Because there is no privity of contract between the plaintiff, as a judgment creditor of the Texas and Atlantic Refrigerator Car Company, and the defendants, Stevens and Mirick, as stockholders therein, and the plaintiff, as such judgment creditor, cannot maintain this action at law on his judgment against the said Texas and Atlantic Refrigerator Car Company to recover against said defendants the balance remaining unpaid on their subscription to the capital stock of said company.

3. Because this court in an action at law has no jurisdiction over the subject-matter of said action to render a judgment therein for the plaintiff and against said defendants for the amount found by the verdict of the jury, or for any amount at all.

4. Because this court, sitting only as a court of equity, has jurisdiction to render a judgment for the plaintiff on the judgment described in his petition, without suing as well for himself as for all other creditors of the Texas and Atlantic Refrigerator Car Company, and making all stockholders in said company who have not fully paid up their stock therein parties defendant to such suit.

5. Because all the necessary parties defendant are not before this court to authorize it to render judgment

for the plaintiff on the judgment described in his petition. (Rec., 79, 80.)

The motion for a new trial, as well as the motion in arrest of judgment, were overruled on the 12th of September, 1885, and exceptions were duly saved to these rulings. (Rec., p. 80.)

The same day the plaintiff in error sued out this writ of error.

Assignment of Errors.

The following errors are assigned:

1. The court below erred in holding that the Circuit Court of Pettis county, Missouri, had acquired jurisdiction over the defendant in the case of Wm. Nichols, plaintiff against the Texas and Atlantic Refrigerator Car Company, defendant, by virtue of the service of the summons in said case upon J. R. Barrett, as president of said company, when said suit was prosecuted by said Nichols for the use and benefit of said Barrett.

2. The court below erred in holding that the judgment by default rendered in said case was a legal, valid and binding judgment in favor of said Nichols and against said Texas and Atlantic Refrigerator Car Company.

3. The court below erred in admitting in evidence the copy of the record in said case.

4. The court below erred in not sustaining Stevens' demurrer to plaintiff's evidence.

5. The court below erred in not giving to the jury defendant's instructions, and each of them, as requested.

6. The court below erred in its charge to the jury, failing therein to give the law of the case.

7. The court below erred in rendering judgment in favor of the defendant in error and against the plaintiff in error for the full amount sued for, whereas it should have rendered judgment for the plaintiff in error and against the defendant in error.

The principal questions presented by the record in this case are—

First. Did the Circuit Court of Pettis county, Missouri, acquire jurisdiction over the Texas and Atlantic Refrigerator Car Company by the service of the summons on J. R. Barrett, as president thereof, in the case of William Nichols against said company, when the suit was prosecuted by Nichols for the use and benefit of Barrett?

Second. Can Nichols prosecute this suit for Barrett's use and benefit when Barrett is the real party in interest?

Third. Is not Barrett disabled, by reason of his *fiduciary* relation to the plaintiff in error, as a stockholder in the Texas and Atlantic Refrigerator Car Company, from prosecuting an action at law against said company? And, if so, then is not the defendant in error likewise disabled from prosecuting this action at law for the use and benefit of Barrett?

Fourth. If he cannot, then was it not necessary for Barrett or Nichols to have filed a bill in equity, suing not only in behalf of himself but likewise in behalf of all other creditors who would come in and contribute towards paying the costs of such suit, and have made all the stockholders of said corporation who had not paid their stock in full parties defendant to said suit?

JURISDICTION.

1. When a suit is brought upon a judgment of a State court in the courts of the United States, or a right is claimed by or through such judgment, the jurisdiction of the former in rendering the judgment may always be inquired into by the latter; and if the former had jurisdiction, its judgment, even if erroneous, is binding until reversed in the United States courts. But if it had no jurisdiction over the person or subject-matter, its judgment and orders are regarded as nullities. They are not voidable, but simply void; and no judgment can be recovered thereon or right derived through them. They may be questioned in a collateral proceeding and held void.

Thompson *v.* Whitman, 18 Wall., 457.
Knowles *v.* Gas Light Company, 19 *Id.*, 58.
Hall *et al. v.* Lanning *et al.*, 91 U. S., 160.
Christmas *v.* Russell, 5 Wall., 305.
Elliott *v.* Peirsol, 1 Pet., 328.
In re. Sawyer, 124 U. S., 200.

Says Mr. Justice Bradley in delivering the opinion of this court in the case of Thompson *v.* Whitman, *supra:*

"If it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court has no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent."

Says Mr. Justice Bradley in delivering the opinion of this court in the case of Hall *v.* Lanning, *supra:*

"The question to be decided in this case is, whether after the dissolution of a copartnership one of the partners in a suit brought against the firm has the authority to enter an appearance for the other partners who do not reside in the State where the suit is brought, and have not been served with process, and, if not, whether a judgment against all the partners, founded on such an appearance, can be questioned by those not served with process in a suit brought thereon in another State. We recently had occasion, in the case of Thompson *v.* Whitman (18 Wall., 457), to restate the rule that the jurisdiction of a foreign court over the person or subject-matter embraced in the judgment or decree of such court is always open to inquiry; and that, in this respect, the court of another State is to be regarded as a foreign court. We further held in that case that the record of such a judgment does not estop the parties from demanding such an inquiry.

The cases bearing upon the subject having been examined and distinguished on that occasion, it is not necessary to examine them again, except as they may throw light on the special question involved in this cause. In the subsequent case of Knowles *v.* The Gas Light Company, 19 Wall., 58, we further held, in direct line with the decision in Thompson *v.* Whitman, that the record of a judgment showing service of process on the defendant could be contradicted and disproved."

Let us ascertain whether the Circuit Court of Pettis county, Missouri, had jurisdiction over the Texas and Atlantic Refrigerator Car Company when it rendered the judgment by default, which the defendant in error seeks to make the basis of the judgment in this case.

The practice act of the State of Missouri expressly requires that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section"—Sec. 3462,

Rev. Stats. of Mo., vol. 1, 1879.) The next section is as follows:

"An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name, without joining with him the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

The defendant in error is neither an executor nor administrator, a trustee of an express trust, nor a person expressly authorized by statute to sue in his own name. Nor is he a person with whom, or in whose name, the notes upon which the judgment by default was rendered were made or indorsed. He did not sustain the relation of payee or indorser on said notes, and he had no interest in said notes when suit was instituted on them, unless the illegal and *collusive* agreement into which he entered with Barrett, when Barrett paid them off, to sue in his name for Barrett's use and benefit, constituted him a trustee. It is averred that it did not. Barrett was both payee and indorser on said notes, and when he paid them off he would have had the right to sue on them in his own name if he had not sustained the relation of *trustee* to the Texas and Atlantic Refrigerator Car Company, ostensible maker, and its stockholders. This will be explained hereafter.

Williams & Yeatman *v.* Whitlock, 14 Mo., 552.

The practice act of the State of Missouri has adopted the rule of equity pleading which requires all suits to be prosecuted in the name of the real party in interest.

It follows, then, that the defendant in error was not "the real party in interest," and that he had no standing in court on the undisputed facts in the case.

Barrett was "the real party in interest"—the real plaintiff in the case of Nichols against the Texas and Atlantic Refrigerator Car Company in the Circuit Court of Pettis county, Missouri, but Nichols was made the nominal plaintiff on the record. When this artifice was disclosed on the trial of this case, certainly said court had no jurisdiction, and the judgment rendered therein was a nullity.

Michoud *v.* Girod, 4 How., 503.
Davoue *v.* Fanning, 2 John. Ch., 252.

Barrett being the real plaintiff in that case, suppose he had brought the suit in his own name, instead of Nichols' name, and the summons had been served on him as the president of the Texas and Atlantic Refrigerator Car Company, and judgment by default had been rendered on this service, would not the judgment have been void? And, if so, does the mere interposing of the name of Nichols as plaintiff change the case from what would have been a void judgment if he had sued in his own name? No man can fill the inconsistent and incompatible characters of plaintiff and defendant in the same case, any more than he can make a valid contract with himself. Barrett as an individual could not sue the Texas and Atlantic Refrigerator Car Company through Barrett as its president, and have the summons served on himself as its legal representative. His interest on one side would conflict with his duty on the other; and the law, in its wisdom, would not, and does not, place him in the position where his interest and his duty conflict.

Every suit is based on the assumption that there is a real conflict between *adverse* interests, which the parties themselves cannot settle, and hence resort is had to the proper judicial tribunal to determine it according to the rules of law. But there can be no binding de-

termination of any interests or controversy without party has notice to come in and show cause, if any he has, against the complaint and relief sought by the *actor* in the suit. The notice must be served on the *adverse* party, or on some one, who, by obligation, duty, or interest, is bound to protect the rights of the adverse party. The whole theory of jurisprudence requires that the party against whom the complaint is made must have *notice* of the complaint—must have his day in court to answer it, and show that it it false or unfounded in fact, if he can do so; or, if he is not notified, any judgment by default or decree *pro confesso* that may be taken against him will be a nullity.

A notice in a suit imports, by its very terms, a service of the summons upon the adverse party, or, in case of a corporation, upon an officer or agent who is the representative of the adverse side—one who is faithful and loyal to the adverse side—and not upon an officer who is the real party in interest in the suit against the corporation, and whose interest it is to conceal the service of the summons on him, so that his complaint may be admitted by failure on the part of the corporation to deny it. The very object and purpose of serving a summons might be effectually thwarted by serving it upon the one who brings the suit, the real party in interest, and his concealing the service; and the corporation might be financially ruined, when, in fact, it had a good and meritorious defense to the complaint made against it.

A judgment by default taken against a corporation upon the service of the summons upon the plaintiff who is the president of the corporation is null and void.

Buck *v.* Ashuelot Manufacturing Company, 4 Allen, (Mass.,) 357.

A decree *pro confesso* taken against a corporation upon a service of the summons upon one of the plaintiffs, who is a director in the corporation, is null and void, although, in the absence of the president and the other officers, it would have been a legal service if the director had not been one of the plaintiffs in the case.

St. Louis and Sandoval Coal & Mining Co. *v.* Edwards, 103 Ill., 472.

St. Louis and Sandoval Coal & Mining Co. *v.* Sandoval Coal & Mining Co., 111 *Id.*, 32.

Same *v.* Same, 116 *Id.*, 170.

St. Clair *v.* Cox, 106 U. S., 350.

Harris *v.* Hardeman *et al.*, 14 How., 334.

So jealous is the law of self-interest that it will not permit an officer to serve process in a case in which he is a party, or is the complainant. "The law wisely foreseeing that the ministers of justice should be freed, as far as practicable, from all the improper bias which may result from self-interest, has declared that no man shall be his own officer, and that no one shall, in his own person, and by his own hand, do himself right by legal process. Therefore, where an officer is interested, it declares that another shall act; and this in principle applies to all, though to some with greater, others with less, force."

Singletary *v.* Carter, 1 Bailey, (So. Ca.,) 467.

No distinction is taken as respects the nature of the process or the degree of interest which disqualifies an officer from serving process in a case to which he is a party. The broad ground is taken that no officer who is interested in a suit, or who is even a party to it without interest, shall serve any process appertaining to it from the commencement to the conclusion. And

a judgment by default taken upon a service in such a case is a nullity.

Knott *v.* Jarboe, 1 Met., (Ky.,) 504.
Chambers *v.* Thomas, 3 A. K Marsh, 536.
Gage *v.* Graffan, 11 Mass., 181.
Boykin *v.* Edwards, 21 Ala., 261.
Woods *v.* Gilson, 17 Ill., 218.
Filkins *v.* O'Sullivan, 79 Ill., 524.
Ford *v.* Dyer, 26 Miss., 243.

Where an officer is disqualified from serving process his deputy is likewise disqualified, for the deputy can only act for him and in his name.

Gage *v.* Graffan, 11 Mass., 181.
May *v.* Walters, 2 McCord, 470.

Even where the officer is not a party to the suit, but is the husband of a party, he is disqualified from serving process.

Scanlan *v.* Turner, 1 Bailey, (So. Ca.,) 421.

Where a corporation is under the control of the guilty parties, and a suit involving their management is necessary, the court would not allow them to bring the suit, even if they were willing. It would be a mockery of justice to require or permit such a suit to be prosecuted under their management.

Cook on Stock and Stockholders, (695,) and cases cited.
Heath *v.* Erie Railway Co., 8 Blatch., 347.

All the analogies of the law are against the legality of the service of the summons in this case.

It follows that the service of the summons in the case of William Nichols against the Texas and Atlantic Refrigerator Car Company, in the Circuit Court of Pettis County, Missouri, was illegal; that said court never

acquired jurisdiction over said company; and that the judgment by default rendered on said service was, and is, null and void. And being null and void, that it was not legally admissible in evidence against the plaintiff in error in this case for the purpose of basing a recovery thereon against him as a stockholder in said corporation.

What the practice act of Missouri, above referred to, provides, is contained, in different language, in sec. 5 of the act of Congress, of March 3d, 1875, ch. 137, and, according to the application frequently made of this act to cases, this suit has no standing whatever. It is in all respects collusive, and a fraud upon the jurisdiction of the court. Not more in point in this regard is *Hayden* v. *Manning*, 106 *U. S.*, 586, and are the cases therein cited, than is this, and right here the argument might well be concluded.

See also Farmington *v.* Pillsbury, 114 U. S., 138.

DIRECTORS ARE TRUSTEES.

II. The directors of a corporation are trustees for the corporation and its stockholders.

Jackson *v.* Ludeling, 21 Wall., 616.
Sawyer *v.* Hoag, 17 *Id.*, 610.
Wardell *v.* U. P. Railway Co., 103 U. S., 651.
Cumberland Coal Co. *v.* Sherman, *et. al.*, 30 Barb., (N. Y.), 553.
San Diego *v.* S. D. & L. R. R. Co., 44 Cal., 116.
Railroad *v.* Howard, 7 Wall., 392.

So is the president a trustee for the corporation and its stockholders

The unpaid stock subscriptions are a *trust fund* for the payment of the debts of an insolvent corporation.

Wait on Insolvent Corp., sec. 142.
Wood *v.* Dummer, 3 Mason, 308.
Sawyer *v.* Hoag, 17 Wall., 610.

Where directors are themselves creditors, they are precluded from so dealing with the property or assets of the corporation as to secure to themselves preferences and advantages over other creditors.

Wait on Insolvent Corp., sec. 570.
Koehler *v.* Black River Falls Iron Co., 2 Black., 715.
Thompson, Stockholders' Liability, sec. 386.

The unpaid subscriptions for stock being a trust fund, should be administered in equity for the benefit of all creditors, and not at law for the benefit of Barrett alone.

Barrett sustained the relation of *trustee* to the Texas and Atlantic Refrigerator Car Company and its stockholders in the double capacity of president and director; and by reason thereof he could not sue *at law* any more than one partner can sue another partner at law on an *unsettled* partnership account.

Story, Eq., secs. 66, 79, 80, 81.
Perry on Trusts, secs. 13, 17.
Van Ness *v.* Forrest, 8 Cr., 30.

The relation of directors and officers to a corporation and its stockholders is *fiduciary*. It is similar to the relation of a partner to his copartners. One partner is an integral part of the partnership; and for this reason he is so identified with it that he cannot sue it in an action at law.

No man can sue himself at law for technical reasons. But this technicality does not exist in a court of equity. It is sufficient in a court of equity that all parties in interest are before the court as plaintiffs or as defendants, and they need not, as at law, in such a case, be on opposite sides of the record.

Story, Eq., secs. 679, 680.

This very case illustrates the necessity of taking an *account.* "Barrett acted as president, secretary, treasurer, and everything else; in fact, he was the company." (Mirick's testimony, Rec., 71.) No man can tell from this record whether Barrett is indebted to the company or the company to Barrett. This fact can only be ascertained by taking an account of all the transactions of the company. This account cannot be taken in an action at law. It can only be taken in a court of equity.

Story, Eq., sec. 664.

The payment of the two notes to the Commercial Bank of St. Louis by Barrett, upon which the judgment by default was rendered, was simply that much money *advanced* for the company. But how much did Barrett owe the company? This record does not show. Barrett subscribed for $25,000 stock. Was it all paid? If so, when and how? Did he pay it by crediting himself with his salary at $5,000 a year when his services were not worth that sum? "It was too much for a man of his business capacity." (Rec., 71.) It was never fixed by the company or its directors. Did he credit his stock with his large traveling expenses? If so, how much? His accounts never were settled. No officer or agent of the company was authorized by the by-laws to settle with him. Only the Board of Directors could settle with him; and it never did settle. He could not settle with himself.

Davis *v.* Rock Creek L. F. & M. Co., 55 Cal., 359, and cases.

When did his large salary and large traveling expenses cease? Was it before or after he had sold all its property under the deeds of trust given to secure himself, and the return of *nulla bona* of the execution for his use and benefit? After the corporation became insolvent

he could not legally set off his stock with his salary and traveling expenses. This gave him an unjust preference over other creditors of the corporation, which is not permissible in equity. The debt which he owed the corporation for his stock, and the debt which the corporation owed him for his salary and traveling expenses, and the money advanced to the Commercial Bank of St. Louis, were not mutual debts, and they could not be set off against each other. The debt which he owed for his stock was a trust fund for the payment of all other creditors of the corporation.

Lawrence *v.* Nelson, 21 N. Y., 158.
Shickle *v.* Watts, 94 Mo., 418.
Sawyer *v.* Hoag, Assignee, 17 Wall., 610.

Barrett, as president of the Texas and Atlantic Refrigerator Car Company, could not make a note to Barrett, individual. He could not contract with himself.

Wilbur *v.* Lynde, 49 Cal., 290.

Barrett testified that he had authority from the directors to execute the notes in question. (Barrett's testimony, p. 46.) And he produces a resolution (Exhibit B, p. 51,) as his authority. But it does not sustain his testimony in this respect. It reads: "The president is hereby authorized to *borrow* such amount as may be necessary for carrying on the business, and to give the company's paper therefor, and will protect him against any loss by reason of his endorsement as security therefor."

This is no authority to make a note to himself, and as he was disqualified by reason of his fiduciary relation to the corporation from contracting with himself, the notes in question were null and void as notes.

Barrett testified that the book containing the record of the proceedings of the Board of Directors is *lost*

(Rec., 44), and he gave that as a reason why he did not furnish a copy of the resolution authorizing him to make the deeds of trust securing the notes in question. But he testified that the resolution was passed at a *called* meeting of the Board at Denison, Texas, on the 29th of May, 1875. That there were present at that meeting himself and F. A. Hyatt and T. L. Rankin. (Rec., 44.)

He, being the payee and indorser on the notes to be secured, was disqualified by self-interest from sitting and acting as a director in the passage of the resolution for his own security.

Foster *v.* Mullanphy Planing Mill Co., 92 Mo., 89.
Chew *v.* Ellingwood, 86 *Id.*, 260.
Hartchinson *v.* Green, 91 *Id.*, 366.
Eppright *v.* Nickerson, 78 *Id.*, 482.

Moreover, he does not show that notice of said meeting was given to the other directors—the Board consisted of five—nor that there was any by-law authorizing him, as president, to call said meeting. It follows, then, that the deeds of trust securing him as payee and indorser on said notes was null and void.

Even if the meeting of the directors had been a legal one, Barrett, by reason of his fiduciary relation to the corporation and its stockholders, could not thus secure to himself a preference and an advantage over other creditors of the corporation.

Barrett's Incapacity to Sue Extended to Nichols.

III. Barrett, by reason of his *fiduciary* relation to the Texas and Atlantic Refrigerator Car Company, was disabled from prosecuting an *action at law* against it.

Pollard *v.* Bailey, 20 Wall., 520.
Terry *v.* Tubman. 92 U. S., 156.

And if he was disabled to prosecute an action at law against said company, he could not confer authority on Nichols to do so for his use and benefit. What he could not do *directly* he could not do *indirectly*.

IV. This being a suit at law to recover a trust fund, the court below had no jurisdiction. A court of *equity* is the only forum in which trusts are cognizable. When the case was removed from the Circuit Court of Pettis county, Missouri, into the Circuit Court of the United States for the Western District of Missouri, the subject-matter of it properly placed it on the *equity* side of that court; and the pleadings, according to the practice obtaining in the Circuit Courts of the United States in cases of removal, should have been *reformed*.

Thompson *v.* Railroad Co., 6 Wall., 134.
Bennett *v.* Butterworth, 11 How., 669.
Perry on Trusts, Sec. 63, 65.
Oelrichs *v.* Spain, 15 Wall., 228.

A bill should have been filed by Barrett, he being the real party in interest on behalf of himself and all other creditors who would come in and contribute towards paying the cost of the suit, making all the stockholders of the Texas and Atlantic Refrigerator Car Company who had not paid their stock in full, parties defendants. This is the practice which obtains in such cases in the United States Circuit Courts. The trust fund, if insufficient to pay the creditors in full, is by such suit distributed *pro rata*. This is equity. No one creditor is permitted to gain a preference or unfair advantage over other creditors. Such a thing is not tolerated in equity. Nothing but absolute fairness and equality is allowed.

Case *v.* Beauregard, 101 U. S., 688.

The Texas and Atlantic Refrigerator Car Company was a *business* corporation organized under the eighth article of chapter 21 of the Revised Statutes of Missouri. Under the provisions of that article the remedy against a stockholder for unpaid stock is by *suit.*

Stats. of Mo., Sec. 940.

Haskins *v.* Harding, 2 Dillon, 99.

The remedy by *suit* against stockholders, in business corporations, is *exclusive* of all other remedies.

Fourth National Bank *v.* Franklyn, 120 U. S., 747.

It was contended by counsel for defendant in error in the court below on the argument of the motion in arrest of judgment, that the petition might be treated as a *motion* for execution on the judgment rendered by the Circuit Court of Pettis county, Missouri, under section 736 of the Revised Statutes of Missouri (vol. 1, 1879), and the court so treated it, and the motion was overruled. But this is an erroneous ruling, for the very obvious reason that the statute expressly provides that the remedy against a stockholder in a *business* corporation to recover his unpaid stock shall be by "suit," and this is such an expression of one that it excludes all others.

This case possesses all the elements of a suit as required by the practice act of the State of Missouri. A petition in form and substance was filed in the name of the defendant in error against the plaintiff in error and H. D. Mirick in the office of the clerk of the Circuit Court of Pettis county, Missouri, on the 25th day of January, 1881; a summons was duly issued to the sheriff of that county returnable to the next term of that court, and, the defendant not being found, an *alias* summons was issued and served on the plaintiff in error, and Mirick voluntarily entered his appearance, and they

filed an answer. After the case was removed an amended answer was filed and a reply was filed to the answer. Issues were joined and they were submitted to the jury and a verdict rendered for defendant in error, and judgment rendered on this verdict. Here are all the elements of a regular *suit at law* under the practice act of the State of Missouri. (*Vide*, Chapter 59 of the Revised Statutes of Missouri.)

This case was not inaugurated by the defendant in error by filing a *motion* for execution under section 736 of the Revised Statutes of Missouri, and it was too late for him to shift his ground when he had recovered a regular judgment, not only in form but in effect, after it was challenged by motion in arrest of judgment.

The motion for execution under section 736 is not an *original* but a *supplemental* proceeding on the judgment rendered against the corporation. But the petition filed in this case is an *original* suit seeking an independent *judgment* against the plaintiff in error for the amount of his unpaid stock in the Texas and Atlantic Refrigerator Car Company. The crucial test in a case of this kind is this: If the motion filed asks simply that an execution for the amount of the stockholders' unpaid stock be issued on the judgment against the corporation, then it is a motion for execution under section 736; but if it asks for a *judgment* against the stockholder for the amount of his unpaid stock, then it is a *suit* on a stockholder's liability.

Paxon *v.* Talmage, 87 Mo., 13.

The word "suit," in section 940, is used in a technical sense—*i. e.*. it requires the suit to be brought by and against all necessary and proper parties plaintiff and defendant. As the suit is to recover *a trust fund*, it must be by a bill in equity, and the rules and principles of equity pleading and procedure define by whom

and against whom the suit must be brought. It should be brought by Barrett for himself and all other creditors who might come in and contribute towards paying the costs of the suit, and against all the stockholders who had not paid their stock in full, and then the Court would decree the sum recovered to be paid *pro rata* to the creditors, if insufficient to pay them in full. This would settle everything in one suit, and thus prevent a *multiplicity* of suits.

There was a defect of parties plaintiff as well as parties defendant. This is apparent on the face of the record. Moreover, the distinction between actions at law and suits in equity is strictly preserved in the courts of the United States. What is properly the subject of an action at law cannot be tried by a suit in equity. This case, being for a *trust fund*, could not legally be tried by this action at law.

It should have been tried on the *equity* side of the court.

COLLUSIVE JUDGMENT.

V. The judgment by default rendered in the Circuit Court of Pettis county, Missouri, was recovered by *collusion* between Barrett and Nichols for the purpose of unjustly coercing money out of the plaintiff in error. He was no party to that judgment, had no right to control it, and he could not appeal from it, as none but parties to the record can appeal, (109 U. S., 173.) Hence, it is not *res judicata* as to him. He has a right to impeach, as he attempted here.

Michaels *v.* Post, 21 Wall., 426, 427.
Freeman on Judgments, 334, 335, 336.
Parkhurst *v.* Summer, 23 Verm., 538.
Dakota County *v.* Glidden, 113 U. S., 222 and cases cited.

And having shown the whole thing was a device on

the part of Barrett and Nichols to give jurisdiction that could not be properly exercised, and to avoid an accounting in equity, the only mode by which the rights here could be fully ascertained and determined, the case should be reversed, and the court below directed to dismiss the case, as was done in *Hayden* v. *Manning*, *supra*.

Respectfully,

A. H. GARLAND and
JAMES CARR,
Attorneys for Plaintiff.

Jan 2 1889

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

NO. 190.

ROBERT S. STEVENS, Plaintiff in Error,

vs.

WILLIAM NICHOLS.

In error to the Circuit Court of the United States for the Western District of Missouri.

STATEMENT OF THE CASE, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

GEO. P. B. JACKSON,
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Gazette Print, St. Louis, Mo.

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Statement of the Case by Defendant in Error.

This is a proceeding to recover from the plaintiff in error an unpaid balance due upon his subscription to the capital stock of the Texas and Atlantic Refrigerator Car Company by the defendant in error as a judgment creditor of said corporation. The proceedings were commenced in January, 1881, in the circuit court of Pettis County, Mo., when the defendant in error, as plaintiff in said proceeding, filed his petition (Record p. 3), alleging the incorporation of the

Texas and Atlantic Refrigerater Car Company; the execution of two notes by said corporation, dated respectively May 6th and 14th, 1875, each due in three months after date, and the recovery of judgment in the sum of $10,377.21 thereon against said corporation by this defendant in error at the January term, 1876, of the said circuit court of Pettis County, Mo., in a suit commenced on Dec. 11th, 1875.

Also the issuing of execution on said judgment and the return of the same with a credit of $12.00 and *nulla bona* as to the residue, and that, except said sum of $12.00, the whole of said judgment remained unpaid and due the plaintiff.

Then follows the further allegation of the subscription to the stock in said corporation by the plaintiff in error in the sum of $5,000.00 upon which, it was admitted, he had paid $1,000, and that the balance was still due and unpaid; and that the plaintiff, defendant in error, had demanded the same on March 7th, 1876,

Then follows a prayer for judgment against said Stevens, plaintiff in error, for the said balance of $4,000.00 with 6 per cent. interest from March 7th, 1876.

Summons was issued and served upon said Stevens, and he appeared in the circuit court of Pettis County, Mo., and by proper proceedings procured the removal of said case to the United States Circuit Court for the Eastern Division of the Western District of Missouri. (Record pp. 7-9.)

In the U. S. circuit court the plaintiff in error filed an amended answer (Record p. 11,) in which he denied each and every allegation in the petition, and further alleged that the notes upon which the judgment had been recovered by the defendant in error, Nichols, against the Texas and Atlantic Refrigerator Car Company had been executed by said company by its president, J. R. Barrett, to himself as payee, and endorsed by said Barrett in blank; that prior to the institution of said suit against the corporation, and after the maturity of said notes, said Barrett, the payee and endorser thereof, had paid off and fully satisfied said notes to the Commercial Bank of St. Louis as the owner and holder thereof, and that at the

time of the institution of said suit against the corporation, and at the time of the judgment therein, the plaintiff Nichols had no title or interest in the said notes or either of them, and that he instituted and prosecuted said suit in his own name for the exclusive use and benefit of said Barrett in pursuance of an illegal and corrupt agreement between Nichols and Barrett; that Barrett is the real party in interest; that said suit was instituted and prosecuted for the purpose and with the intent of unjustly and illegally coercing money out of the plaintiff in error as a stockholder in said Texas & Atlantic Refrigerator Car Company, and for the purpose of preventing the defendant as such stockholder from setting up certain equities and defenses existing between said Barrett as president of said Texas & Atlantic Refrigerator Car Company and this plaintiff in error as a stockholder therein.

The answer further alleges that the said pretended judgment against said corporation was obtained and procured by fraud. (In what this supposed fraud consisted is not alleged.)

To this answer was filed a reply admitting the execution of the notes by J. R. Barrett as president. and that the same were payable to his order, and endorsed by him; and alleging that they were so executed under direction and authority of the officers and directors of the company in the regular course of business for a good and valuable consideration.

The reply then puts in issue all other allegations of new matter contained in the answer; and further pleads that the matter of the ownership of said notes and the right of the plaintiff Nichols to recover judgment thereon and the liability of the Texas & Atlantic Refrigerator Car Company on said notes were matters at issue in said suit on said notes, and were therein submitted for adjudication to the circuit court of Pettis County, Mo., which rendered judgment on said notes, and that all said matters were concluded by said judgment, and are *res adjudicata* as to said Texas & Atlantic Refrigerator Car Company and the defendant Stevens, plaintiff in error, as a stockholder therein. (Record p. 15.)

At the April term, 1885, of the United States circuit court the cause was tried before a jury. The plaintiff Nichols offered in evidence a certified copy of the proceedings and judgment in the case of William Nichols against the Texas & Atlantic Refrigerator Car Company in the circuit court of Pettis County, Mo., to the introduction of which the defendant Stevens objected for the reason that the United States circuit court had no jurisdiction over the subject-matter of this suit; because the defendant Stevens was not a party to the judgment in said Pettis County circuit court; because J. R. Barrett was the owner of the notes upon which said judgment was recovered, and was president of the said Texas & Atlantic Refrigerator Car Company, the maker of said notes, at the time suit was brought thereon, and said suit was brought for his benefit, and was served on him as president of said company, and that judgment was rendered by default and is null and void; and because said record was incompetent evidence against the defendant Stevens for any purpose except to show that the plaintiff (Nichols) had recovered jndgment against the Texas & Atlantic Refrigerator Car Company, and an execution had been issued thereon and returned *nulla bona.*

These objections were overruled by the court, and the record was read in evidence. It was a full transcript of the pleadings, record entries and the execution and return thereon in the said case of Wm. Nichols vs. the Texas & Atlantic Refrigerator Car Company, in the circuit court of Pettis County, Mo., showing that said suit was instituted Dec. 11, 1875, upon two notes executed respectively on May 6 and 14, 1875, by the said Texas & Atlantic Refrigerator Car Company by J. R. Barrett, president, for the sums of $5,800.00 and $4,200.00 respectively, both payable three months after date to the order of J. R. Barrett, at the Commercial Bank of St. Louis, and endorsed by J. R. Barrett and Joel Ellis; also, that summons issued on said suit, and was served on J. R. Barrett as the president of the Texas & Atlantic Refrigerator Car Company; that at the January term of 1876 judgment was rendered on

said notes in the sum of $10,377.21 ; that afterward execution issued on said judgment and was subsequently returned with a credit of $12.00 and unsatisfied as to the balance, "There being no other goods, chattels or property found belonging to the defendant on which to levy this execution." (Record pp. 23-27.)

The plaintiff also read in evidence the subscription paper to the stock of the Texas & Atlantic Refrigerator Car Company, as follows :

"We, the undersigned, hereby subscribe the number of shares set opposite our names in the Texas & Atlantic Refrigerator Car Company, and obligate onrselves to pay therefor according to the by-laws or resolutions of the Board of Directors of said Company.

Witness our hands this —— day of July, 1873.

Name.	No. of shares at $100 each.
R. S. Stevens,	Fifty shares (50)
J. R. Barrett,	250 "
F. L. Rankin,	100 "
F. A. Hyatt,	100 "
W. P. Robinson,	100 "

(Record page 28.)"

Also stock-stub as follows :

"Texas & Atlantic Refrigerator Car Company of Missouri.

No. of certificate, 8.
No. of shares, twenty.
Amount paid, $1.000.00.
To whom issued, R. S. Stevens,
Residence, Sedalia, Mo.
Date, Aug't 1, '74.
Received certificate referred to above, this day of 187 ."

(Record page 29.)

This was all the evidence offered by the plaintiff.

The defendant then offered a demurrer to the plaintiff's evidence, which was overruled by the court, and defendant excepted.

The defendant then read in evidence the deposition of the plaintiff, Nichols, taken by the defendant in St. Louis, on September 7th, 1883, in which Nichols testified: that he resided in the city of St. Louis, and that he was then the president of the Commercial Bank of St. Louis; that he had held a great many notes of the Texas & Atlantic Refrigerator Car Company, at one time having as much as $40,000 of its notes; that he was unable to testify in regard to any particular note by a statement of its date and amount without he could see the note itself; that he kept no memorandum of the transactions about said notes; that whether any particular note was secured by a deed of trust on property in Denison, Texas, he was unable to state; but he did have some notes so secured, and he and the trustee, Johnson, went to Texas and sold the property, but he could not remember what notes they were. He bought in the property at the sale; did not know what was the value of the property at that time. Could not recollect how many people were present at the sale; a large number, but they were all strangers to him. The property sold was a piece of land and an old slaughter-house. He afterward sold the land for $150. Thinks there was another deed of trust made by the Company on a steam engine and boiler, and other apparatus in the slaughter house at Denison, and also on 50 cars belonging to the Refrigerator Company, but does not recollect whether he was present at the sale of that property or not. If the property under both deeds of trust was sold at the same time, he was present; but if sold at different times he thinks he was not, as he did not remember of having gone to Texas more than once on that business; didn't recollect whether other persons bid or not. Did not then recollect the amount of the bid, nor whether or not all of the Refrigerator cars were present at the time of the sale. There was no fraud or concealment about the sale; it was free and open

to any body that wanted to bid, and he would have been glad for some one else to have done so. After the cars were bought at the trustee's sale, he leased them for a while to the Missouri, Kansas & Texas Railway Company, and afterward sold them to the Company. Could not then state the terms of the lease, but thought it was one and a half cents per mile. Could not state the date of the sale of the cars to the railroad company, but it was while William Bond was receiver of the Missouri, Kansas & Texas Railway. He could not then state the terms of the sale, but knew that there was at the time due on the cars about $30,000 to the manufacturing company that made them, and that company held the title to them until they were paid for. He knew that they were sold for enough to the railroad company to pay the manufacturing company the amount due on them, which was paid, but whether he realized any more or not, he was unable to say. The Commercial Bank collected the money from the Missouri, Kansas & Texas Railway and paid it to the Springfield Company that had the lien on them. "I cannot tell you whether I got a cent from them myself or not. I do not know of any way by which I can refresh my memory about it; if I was to be hung for it, I cannot tell." My recollection is that the fixtures in the slaughter house were sold for old iron, except perhaps the engine, but I do not recollect much about that. The Commercial Bank owned some of the Refrigerator Car Company notes. I don't know whether they owned these notes or not. I could tell by looking. I authorized Philips and Vest to bring suit on these notes. I can't tell whether these notes have been paid without looking at them. This suit is prosecuted for the use and benefit of J. R. Barrett.

Question. Have you any interest in this suit?

Answer. I can tell you exactly how the case stands. Mr. Barrett and the Refrigerator Car Company both owed the bank and myself a large amount of money; it was the Company's debt, and Barrett was endorser for it. I was anxious to get it paid, and in order to get the money I agreed to

prosecute this suit against the stockholders of the Refrigerator Car Company. I agreed with Mr. Barrett to do this. Mr. Barrett mortgaged his property and paid us the amount due. I can't say when it was that Barrett paid this. He paid both to the bank and myself. He paid all of the debts of the company, and it must have cost him a great deal of money, as I understand he paid the entire debts of the Car Company. He mortgaged his farm to the Northwestern Mutual Life Insurance Company for $35,000 in the fall of 1875, and with the money realized paid off all the debts of the Car Company, so far as I know. This payment was before the commencement of the suit against the Texas & Atlantic Car Company. I had in my possession some 8,000 or 10,000 dollars in bonds issued by the city of Denison as security for some debt of the Car Company. Do not remember which it was. Never realized a cent on them. I turned those bonds over to Mr. Barret, I think before the settlement. I don't remember about an injunction to restrain the sale of the property at Denison. The buildings on the property at Denison were burned down; they were insured and some of the insurance money collected. Somewhere between $3,300 and $4,300, to the best of my recollection. I don't remember of any other security for any of the Car Company's debts, and do not know of any other money being realized. I made the sale of the refrigerator cars to the Missouri, Kansas & Texas Railway Company, and Barrett helped me. I closed up the sale and made the transfer.

On cross-examination he said that he supposed the bonds were turned back to Barrett as president of the Car Company; in the debts due to him and the bank the Car Company was the principal and Barrett was on its notes as surety. At the time of the settlement with Barrett the Company had nothing out of which anything could be made. The money market was then very close, and money hard to get. Barrett paid 10 per cent. for the money he borrowed. We knew at the time that Barrett had to borrow the money. It was part of the agreement that Mr. Barrett was to mort-

gage his farm and get the money, and then we were to go on and bring this suit. That is, in consideration of his doing this to expedite the settlement I was to prosecute the suit. I do not think the notes sued on were ever canceled in any manner. I sent the notes to Philips & Vest to have suit brought on them and at the same time I had received from Mr. Barrett the amount of the notes in cash. I gave Barrett my due bill for $10,000 for the amount represented by the notes, which I did not surrender, and those notes which I sent to Philips & Vest for suit would have been cancelled, by reason of the receipt of that amount of money, had it not been for the contract that I was to prosecute the suit brought. Barrett still holds my due bill. I did this for the purpose of aiding Mr. Barrett as a friend of his in getting his money out of the notes. It was not done for the purpose of covering up anything improper in any transactions we had had. Before signing the deposition the witness stated : his recollection was much confused as to whether he was personally present at the sale in Texas, and that he relied upon the statement of Mr. Barrett to him, that he was there. He also added that he then recollected that he did have security on some real estate in Chicago belonging to either Barrett or the Car Company, he did not remember which. (Record pp. 29-37.)

The defendant also read the deposition of J. R. Barrett, taken in Sedalia, Mo., on November 19th, 1883. The witness stated that he was the first and only president of the T. & A. R. Car Company, which was organized in July, 1873. That his active duties as president and the active business of the Company ceased a little before the sale of the property of the Company at Denison in the year 1875. That they had quit slaughtering beef before that date. The stockholders at the time of organization were :

F. L. Rankin,	100 shares
J. R, Barrett,	250 "
F. A. Hyatt,	100 "
W. P. Robinson,	100 "
R. S. Stevens,	50 "

Other parties afterwards became stockholders, and amounts were paid on subscriptions as follows ·

T. L. Rankin,	Nothing
J. R. Barrett,	$ 25,000
F. A. Hyatt,	3,750
W, P. Robinson,	Nothing
R. S. Stevens,	$ 1,000
Levi Parsons,	5,000
H. D. Mirick,	500
H. A. Matherson,	500
Joel Ellis,	25,000
J. B. Thurston,	7,500
William Wicks,	1,500
Edw· Perry,	500
H. B. Henson,	500

The above amounts were paid in cash, except $12,500 which was paid by Joel Ellis, in real estate in Cook County, Illinois, in or near Chicago ; this real estate was conveyed to A. D. Jaynes as trustee for the Refrigerator Car Company; it was an undivided third interest in 18 acres of land. William Nichols was not a stockholder in the Refrigerator Car Company.

As president of the Company I executed two notes to myself. One dated St. Louis, Mo., May 6th, 1875, for $5,800, payable in three months after date at the Commercial Bank, St. Louis, endorsed in blank by J. R. Barrett, and Joel Ellis. And another note dated St. Louis, Mo., May 14th, 1875, for $4,200, payable three months after date at the Commercial Bank, St. Louis, endorsed by J. R. Barrett and Joel Ellis, both notes bearing 10 per cent interest from due. These are the notes upon which judgment was rendered on January 26, 1876, by the Circuit Court of Pettis County, Mo., in favor of Nichols against the Refrigerator Car Company. I negotiated these notes at or near the date of their execution to the Commercial Bank for the benefit of the Refrigerator Car Company. They were not in any way, shape or form for my in-

dividual benefit ; they were not paid at maturity ; they were never paid at all. I never paid them, nor did any one else. The Bank got after me to pay the indebtedness. I was endorser on the notes and told them, or Nichols, who was then the Cashier of the Bank, that if he, Nichols, himself would give me his note for the amount of these two notes, that I would raise money to liquidate the balance of the indebtedness and loan him the amount of these two notes, and he said he would do it. I loaned him $10,000 on his note and took up the balance of the notes that the Refrigerater Car Company owed the bank above these two notes. The amount owing to the bank and Nichols by the Refrigerator Car Company was $22,500 without interest. They were all secured by a deed of trust on the Denison property and one of them, a note to William Nichols for $2,500, dated May 22nd, 1875, was also secured by deed of trust on the Chicago property. The deed of trust on the Chicago property secured the following notes . The North Granville National Bank of New York $5,000 , bill of exchange, at three months from April 9th 1875; the Central Missouri Banking and Savings Association of Sedalia, note for $1,500, dated April 20, 1875, due in 60 days ; note to William Nichols, $2,500 dated May 22nd, 1875, due in one day ; bill of exchange to First National Bank of Sedalia, $2.500, May 17, 1875 ; bill of exchange to J. C. Thompson, $2,500, May 17, 1875, at three months ; this deed of trust was executed by Jaynes, trustee, and the Car Company on June 1st, 1875. The deed of trust on the Denison property secured the following debts ; Bill of exchange, April 25th, 1875, $5,000, at three months to the Commercial Bank ; note to same bank, $5,800, May 6th, 1875, due in three months ; note to same bank, $4,200, May 14th, 1875, due in three months ; note to same bank, $5,000, May 20th, 1875, due in three months ; note to William Nichols, $2,500, May 22nd, 1875, due one day after date. This deed of trust was executed May 31st, 1875. On September 1st, 1875, the Refrigerator Car Company, by me its president, executed a deed of trust to secure the same notes in the last preceeding deed on

a steam engine and boiler and other apparatus in the slaughter house at Denison, Texas, and also on fifty refrigerator cars. I now hold William Nichols' note for $10,000, dated St. Louis, Missouri, December 15th, 1875.

The money I used in the settlement of the Company's debts, I borrowed from the North Western Life Insurance Company of Milwaukee. I borrowed it in my own name, and mortgaged my farm for it. The notes upon which the judgment was rendered against the Refrigerator Company were given to the Commercial Bank of St. Louis. The reason I loaned Nichols the money was I was security on the loans, and he could collect them easier than I. I thought it was the easiest way to collect them. I suppose that the plaintiff bought the notes from the Bank. I think he was cashier at the time these notes matured. I suppose that at the time the suit was brought on them Mr. Nichols owned the notes, he brought the suit, and from the contract I had with him, I conclude he owned them. I do not remember the exact date that I got the money from the Insurance Company, I think it was in January, it might have been in December. The deed of trust was dated December 2nd, 1875, and recorded December 16, 1875, and it was some little time after that I got the money. I do not remember whether I took the notes from Nichols and delivered them to Philips & Vest or not. My impression is that he sent them to Philips & Vest. I do not remember that I employed Philips & Vest to bring suit on these notes, but if I did, I employed them for Nichols. I have never paid them any fee for bringing that suit. I do not know whether Nichols has paid them or not. I have never agreed to pay them any fee for attending to these suits. I do not know what Nichols has done. I suppose the plaintiff is prosecuting this suit for my benefit, that was the agreement. There was no contract to pay Nichols anything for his trouble, or to let him have any part of the proceeds of the judgment. I hold his note for $10,000 and am endorser on the notes he sued on for the same amount, and he has $10,000 of the money. I have not given any directions to

Philips & Vest in regard as to how the suit should be conducted.

Q. Who employed George P. B. Jackson to conduct the present suit?

A. Col. Vest told me that he had left it with Mr. Jackson.

Q. Have you consulted with and taken the advice of Mr. Jackson in regard to the manner of prosecuting this suit?

A. I have talked with him and he has asked me a great many questions about the case; he has asked me all about the history of the case and I have given it to him and he has taken his own course.

I was at Denison on the 13th of November, 1875, when the Slaughter house fixtures, and the other property decribed in the deeds of trust were sold, the plaintiff was there at one time. The first time the property was advertised, the sale did not take place. Whether he was there the first or second time, I cannot say. I think he was there the first time. My impression is that Nichols' attorney bought in the property. I did not buy it in. His attorney was there from Sherman. I did know the attorney's name but I have forgotten it now. I do not think I bid on the property. I think there were others bid besides the attorney, but I am not positive; the property was bid in, in Nichols' name. Some of the cars were in Denison at the time, the balance were on the road somewhere. I saw a half dozen or more there. The cars had been in use about two years at the time of the sale. They originally cost about $1.400 each. The Missouri, Kansas & Texas Railway used some of them and paid milage on them after the sale. I cannot say how much the milage was; it was not enough to pay the interest on the indebtedness on the cars, which was then over $28.000. I was not present at the sale of the property in Chicago. The deed says that it was sold for $5.000 on June 18th, 1877. The real estate in Denison sold for $2.000, the personal property and machinery for $1.000, and the company's interest in the

cars, $500; the costs of the sale, were $225. I do not know what were the costs of the sale of the property in Chicago, I was not there.

The title to the Chicago property still stands in Nichols' name on the records. Mr. Nichols bought the property sold at Denison. He sold the real estate to a party, whose name I have forgotten, for $150; the house and fixtures were burned. The cars he sold to the M. K. & T. Ry Co., for $30.000 on 5 years time, payable $600 per month and interest at the rate of 7 per cent on the deferred payments. The date of this sale I do not recollect; it can be ascertained in the Auditors office of the M. K. & T. Ry Co. Mr. Nichols sold the cars to the M. K. & T. Ry Co., and they were to pay $30,000 to the Wasson Manufacturing Company in payments as above stated. At the time of the sale of these cars to the Railway Company there was due on them to the Wasson Manufacturing Company about $22.000. The difference between $28.000 indebtedness above mentioned and the $22.000 had been paid in the interval between Nichol's purchase and the sale by him, it had either been paid by myself or Mr. Nichols. I got the difference between the amount the cars sold for and the balance due the manufacturing Company, I got it from the Agawam Bank; the Wasson Manufacturing Company had transferred their lien on the cars to the Agawam Bank and took the obligations of the M. K. & T. Ry Co. for the $30.000; the bank then loaned me about $8.000 on my note, and when the M., K. & T. paid in full the bank returned me my note. I have it now at home. I also got the insurance on the Slaughter house, which burned down, $4.400 from Nichols, and there were some expense, attorney's fee, etc. in procuring it. I do not remember of any other money received by me from any other source. I do not know where the Denison bonds now are; they were declared invalid and nothing was realized on them. They were declared worthless by the United States Court in Texas; they were placed in W. H. Barnett's hands, but he never realized anything on them.

I had authority from the Board of Directors of the Refrigerator Car Company to make the three deeds of trust herein before described. That authority was given before I made the deeds, by a resolution at a called meeting of the board of directors. The date of the resolution is May 29, 1875. It was a called meeting of the board at Denison, Texas ; there was a quorum present ; I was there myself and two others. I think the two others were Hyatt and Rankin. The book containing the proceedings of the board of directors is lost, and I can not furnish a copy. That resolution was ratified at the stock holder's meeting in Sedalia, November 1875, I called the meeting at Denison because two of the board of directors were there, and it was hard to get a quorum together. I was authorized to make the deeds of trust at that time because we were out of money and could not pay the notes, and the creditors were pressing us, and the stockholders would not pay up their subscriptions.

The book of the proceedings of the board of directors has disappeared in some way. Directly after the stockholders' meeting in November, 1875, it was put in the First National Bank of Sedalia, and when we went to find it afterwards it could not be found. Mr. J. C. Thompson, the secretary of that meeting, put it in the bank ; both he and I made diligent search for it as soon as we missed it, and have often searched for it since, but have been unable to find it. After the secretary had copied the proceedings of November 10th, 1875, into the record book, he gave the minutes to me and I put them in my box in the vault in the Bank, and that is how I have them now. There was never any understanding between Nichols and me in regard to applying the proceeds of the sale of the property in Texas.

Q. Did you have the present suit instituted against the defendants ?

A. I had nothing to do with it.

Q. Did the plaintiff have it instituted ?

A. I suppose he did.

Mr. Nichols made the bargain with the M., K. & T. in regard to the sale of the Refrigerator cars. I knew more about the cars than Nichols and did some talking in the matter to aid in making the trade.

On cross examination the witness stated .

I am still president of the T. & A. R. Car Company. All the notes referred to in my examination in chief as having been negotiated to the Commercial Bank and to Mr. Nichols were endorsed by me individually. I endorsed them for the Company. I was obliged to do it to get the money and it was wholly for their benefit. I simply endorsed the notes as surety. I had authority from the directors to execute the notes.

The following, marked exhibit "B," is the original resolution adopted by the Board, and which was afterwards entered on the record book :

EXHIBIT "B."

"Resolved, That the President be authorized to build and equip a cooling house at Denison in connection with the slaughter house there.

Resolved, That as it is necessary in order to carry on the business of the company to have more money, that the president is hereby authorized to borrow such amount as may be necessary for carrying on the business and to give the Company's paper therefor, and will protect him against any loss by reason of his endorsement as security therefor."

(Record page 51.)

In regard to the note which was not protested, the Bank demanded payment from me immediately upon maturity of the note, and from my knowledge of the affairs of ths Car Company I knew it was not paid when due. It was some little time after I had the contract with Mr. Nichols for the settlement of these notes before I turned over to him the amount of money called for by the notes. At the time I made the contract with Mr. Nichols for the settlement the notes mentioned in the deeds of trust as belonging to the

Bank were still the property of the Bank. At that time Mr. Nichols was the cashier of the Commercial Bank. The arrangement was made with Nichols at that time that I should pay off all the notes held by him and his bank, and that he would procure these two notes from the Bank, and I would place $10,000. the amount of these two notes, in his hands, for which he would give me his note upon the condition that he would institute and prosecute such proceedings as might be necessary and available to recover from the company or its stockholders the amount unpaid on stock. At that time I did not have the money necessary for the purpose in cash and it was necessary for me to mortgage my farm to raise it. It was a part of the consideration in obtaining that agreement from Mr. Nichols, that I should mortgage my farm to raise the money without unnecessary delay. It was a part of the inducement to me to mortgage my farm to raise this money that Mr. Nichols should obtain these notes from the Bank and carry them until I realized on the mortgage, and then institute and prosecute the suits as before stated. Mr. Nichols procured the notes from the Bank and I set about to procure the loan on my farm. I made the settlement with him entirely from the money I realized from the loan on my farm from the Northwestern Insurance Company. That money was not realized till the sixteenth day of December, 1875, the date of the deed of trust, and it was after that date that I paid off the other notes and placed in his hands the $10,000, the amount of these notes. It was the express understanding that these two notes were not to be paid by this arrangement. The other notes mentioned in the deed of trust were turned over to me as paid. It is a fact that these two notes were never turned over to me, either as the president of the Car Company, or individually, nor to the Company, or any of its officers. At the time I realized on the loan on my farm I placed the $10,000 in Mr. Nichols' hands and took from him the note mentioned in my examination in chief. He has ever since had the money in his hands and has now. He has never paid me any interest on it. It is a fact that out of that arrangement he makes the interest on

the $10,000. It was so contemplated in my agreement with him. In the event that Mr. Nichols fails to recover anything on the two notes on which he sued, he is entitled, under my agreement with him, to still hold me liable on said notes, and he will be entitled to use them in payment of the note I hold against him, and if he recovers only a part of it he will, under that arrangement, hold me liable for the amount uncollected and apply it in payment of the note I hold against him. There was no purpose to cover up anything in having the suit brought by Nichols. I was advised that judgment could be obtained quicker by having the suit brought by Mr. Nichols than if I had paid them off and brought suit in my name. The sales under the deeds of trust had taken place at Denison prior to the settlement I had with Mr. Nichols. I had become liable to the Wasson Manufacturing Company. At the time Mr. Nichols sold the cars, bought by him at the trustee's sale to the M., K. & T. R'y Co., I had already paid off part of these notes and placed the $10,000 some time before. At the time Mr. Nichols sold these cars he had received from me under the agreement the whole amount of the notes which had been given to him and his bank, and he allowed me whatever profit there was on the sale of the cars, or rather excess above the debt due to the Wasson Company. He was not bound to do this, but did it as a favor to me. It was in pursuance of this act that I had the arrangement referred to in my examination-in-chief with the Wasson Manufacturing Company, and the Agawam Bank, by which that bank accepted the obligations of the M., K. & T. R'y Co. and advanced to me the excess thereof above the debt due to the Wasson Manufucturing Company, and took my note for it.

The payments made by me to the Wasson Man'f'g Co. between the time Mr. Nichols bought the cars and the time he sold them were made in view of the fact that I had furnished him the amount of money called for by his notes and that he was to give me the benefit of what could be realized out of the sale of the cars. I received the insurance money

on the slaughter house on the same idea, and under similar circumstances as those detailed as to the sale of the cars. I have not received as much under the benefits allowed me by Mr. Nichols as the amounts I paid for the benefit of the company on account of my endorsements to the bank and to Mr. Nichols, and I paid large sums on account of my endorsements on other notes, for which I have received nothing. I tried to sell the Chicago property for the benefit of the Company, as its president, before it was sold under the deed of trust. I tried repeatedly and had Mr Ellis try. According to my recollection I was told that it might be sold for $4.000 or $4.500.00. but I never had any direct offer. I don't know what it could be sold for at the present time. At the time it was sold under the deed of trust there were some delinquent taxes on the land, and there was a cloud upon the title. It cost $1.550.00 to straighten up the title. The title, I think, is all right now. I identify the papers produced as the ones under which the stock holders' meet- was held Nov. 10, 1875, of which copies are hereto attached, marked Exhibits C. D. & E., as follows:

EXHIBIT "C."

SEDALIA, MO. Oct. 23d, 1875.

To A. D. FISHER, *Justice of the Peace, Sedalia, Pettis Co., Mo.*;

The undersigned would represent that they are stockholders and members of the Texas & Atlantic Refrigerator Car Company, and that on account of legal impediments a legal meeting of such corporation can not be called.

Wherefore they pray that you will as such justice issue a warrant to either of us, directing us to call a meeting of such corporation, by giving notice thereof as by law required.

(Signed.) JNO. MONTGOMERY, Jr.
J. C. THOMPSON.

(Record page 51.)

EXHIBIT "D."

"STATE OF MISSOURI, COUNTY OF PETTIS:

To JNO. MONTGOMERY, JR., *Greeting:*

Whereas, on the written application of yourself and James C. Thompson as members of the Texas & Atlantic Refrigerator Car Company it appears that there are legal impediments in the way of a legal meeting of said corporation otherwise, this is to warrant and direct you as such members to call a meeting of said corporation, as provided by law in such cases made and provided.

Given under my hand the 23d day of October, 1875.

(Signed:) A. D. FISHER,

Justice of the Peace within and for Pettis Co., Mo."

(Record page 51.)

EXHIBIT "E."

NOTICE OF STOCKHOLDER'S MEETING.

Pursuant to a warrant issued by A. D. Fisher, a justice of the peace within and for the County of Pettis and State of Missouri, of date October 23d, 1875, notice is hereby given to the stockholders of the Texas & Atlantic Refrigerator Car Company that there will be a meeting of the stockholders of said corporation at the law office of Philips & Vest, in the City of Sedalia, Pettis County, Missouri, on the 10th day of November, A. D. 1875, the object and purpose of which is to elect a board of directors for said corporation to examine into the action of the board of directors in giving deeds of trust on the property of said corporation to secure certain indebtedness of said Company to the Commercial Bank of St. Louis, Missouri; to the First National Bank, of Sedalia, Missouri; to the North Granville Bank, of North Granville, New York; to the Sedalia Savings Bank of Sedalia, Missouri; to J. C. Thompson, of Sedalia, Missouri, and to William Nichols of St. Louis, Missouri, and to approve of their action or take such steps as may be necessary to protect the interest of said corporation, if said deeds of trust were improperly given, and also to ascertain the extent of the indebtedness of

said corporation and to provide for its adjustment and settlement, the collection of unpaid subscription, and also to examine into the acts and doings of the president of said corporation, touching said indebtedness and the management of the affairs of said corporation, and to take such action thereon as may be advisable or necessary, and for such other and further action on the part of said stockholders as they may deem necessary for the adjustment and settlement of the difficulties of such corporation and for its further management.

SEDALIA, MO., Oct. 23, 1875.

(Signed) JNO. MONTGOMERY, JR."

Which call was duly published according to law.

(Record pp. 52-53.)

I, as president, also issued a call for a stockholder's meeting at the same time, which I identify as the paper marked Exhibit "F," as follows :

EXHIBIT "F."

OFFICE OF THE "TEXAS & ATLANTIC REFRIGERATOR CAR COMPANY," SEDALIA, MO., Oct 18th, 1875.

Dear Sir :—Notice is hereby given that there will be a meeting of the stockholders of the Texas & Atlantic Refrigerator Car Company at the law office of Phillips & Vest, in the City of Sedalia, Missouri, on the 10th day of November, 1875, the object and purpose of which is to elect a board of directors for said company and to ratify the action of the present board of directors in giving deeds of trust on the property of said company to secure certain indebtedness of said company to the Commercial Bank of St. Louis ; to William Nichols ; to the First National Bank of Sedalia, Missouri; to J. C. Thompson; to the North Granville National Bank, of North Granville, New York, and the Sedalia Savings Bank, and to take such other and further action as may be deemed fit and necessary for providing for and securing the indebtedness of said company, and approving the action of

the president of said company, touching said indebtedness and the management of tha affairs of said company.

(Signed) J. R. BARRETT,
Pres. Texas & Atlantic Refrigerator Car Co.

(Record page 53.)

A stockholders' meeting was held in pursuance of these notices. I was present. H. D. Mirick was present and participated in the meeting. I don't think Stevens' stock was represented by Mirick. By reason of the loss of the record book as before explained, it cant be produced, but among the papers of the corporation I find the original resolutions and minutes of that proceeding, which are here produced, and copies of which are hereto attached, marked Exhibits, G, H, I, J, K, L, M, N, O and P, as follows :

EXHIBIT "G."

"At a meeting of the stockholders of the Texas & Atlantic Refrigerator Car Company, at the office of Phillips & Vest, in the City of Sedalia, in the State of Missouri, on the 10th day of November, 1875, the following proceedings were had : Notice to stockholders, petition to justice, warrant of justice and published notice read by which meeting was called. List of stockholders read, showing 900 shares of stock ; 590 shares represented at the meeting. R. C. Sneed and J. B. Gantt appointed judges of election. The following were duly elected directors for the ensuing year: Joel Ellis, J. R. Barrett, J. C. Thompson, E. S. Barrett, T. L. Rankin.

J. R. Barrett presented statements and balance sheets from the books of the Company, which were read.

H. D. Mirick offered a resolution that a committee of three be appointed from the stockholders to examine the books of the Company and report at a meeting of this Company to be held the eleventh day of December. Carried.

F. A. Hyatt offered a bill for services as superintendent for one year and expenses paid, amounting to $6,000, with a

credit of $1,800. Disapproved—J. R. Barrett, E. S. Barrett, J: C. Thompson, opposed; F. A. Hyatt, H. D. Mirick, in favor.

Moved and seconded that resolution No. 1 be adopted. J. R. Barrett, 499 shares, E. S. Barrett, 1, J. C. Thompson, 2½, in favor; H. D. Mirick, 10, opposed.

Moved and seconded that resolution No. 2 be adopted. Same vote as above.

Moved and seconded that resolution No. 3 be adopted. E. S. Barrett, 1, J. R. Barrett, 499, J. C. T., 2½, in favor; F. A. H., 75, opposed.

Moved and seconded that No. 4 be adopted. J. R. B., E. S. B. and J. C. T., in favor; H. D. M., opposed.

No. 5, same as last.
No. 6, " " " with Hyatt.
No. 7, " " " " " and M. opposed.
No. 8, " " " " " " " "

Moved and seconded that the board of directors fix salaries of officers. Carried.

Moved and seconded that meeting adjourn to meet Dec. 11, at the office of Philips & Vest.

(Signed) J. C. THOMPSON, *Sec'y.*

(Record pages 53-54.)

EXHIBIT "H."

(No. 1, Adopted—J. C. THOMPSON.)

WHEREAS, at a meeting of the board of directors, held at Denison, Texas, on the 29th day of May, 1875, as appears on page 17 of the record of the meeting of said board, J. R. Barrett, the president of said company, was authorized and empowered to execute and deliver deeds of trust or mortgages on all the real estate belonging to said company, to certain creditors of said company then specified, and also to convey or sell all cars, bonds and assets of said company to said creditors or any of them, for the purpose of securing or liquidating said indebtedness: and whereas, in accordance

with said resolution, the said president has, since the adoption thereof, executed and delivered to W. R. Johnson, as trustee for William Nichols and the Commercial Bank of St. Louis, two certain deeds of trust, dated, respectively on the 31st day of May, 1875, and on the 1st day of September, 1875, upon the slaughter house, real estate on which same is situated, and all the appurtenances, fixtures, tools, engines and personal property there situated and connected therewith, all in or adjoining the City of Denison, Grayson county, Texas, to secure said Commercial Bank upon four several notes or drafts owing by said Company and amounting in the aggregate to $20,000, principal, and to secure said William Nichols in the sum of $2500 evidenced by a certain note for that sum held by him against said Company; and whereas, also in accordance with said resolution, the said president did, on first day of June, 1875, execute to A. S. Osgood, as trustee for the first National Bank, of Sedalia, Missouri, James. C. Thompson and William Nichols, Sedalia Savings Bank, and the North Granville National Bank, New York, a certain deed of trust upon the tract of land taken by said company, from Joel Ellis upon his subscription to the capital stock of said company, and situated in Cook county, Ill., in or near the City of Chicago, to secure said creditors in the following sums, viz: The First National Bank of Sedalia, Mo., in the sum of $2500; James C. Thompson, $2500; Sedalia Savings Bank $1500; North Granville National Bank, $5000. all of said indebtedness being evidenced by notes and drafts of the company:

Now therefor the action of said board of directors in adopting said resolution and the action of J. R. Barrett, president, thereunder and in the execution and delivery of said several deeds of trust above specified are in all respects hereby fully ratified and confirmed."

(Record pages 54-55.)

EXHIBIT "I."

(No. 2, Adopted—J. C. THOMPSON, *Sec'y.*)

"WHEREAS, at a meeting of the board of directors of

said company held at Sedalia, Mo., on the 10th day of March, 1875, the following resolutions were adopted, viz; Whereas the company is in debt and it has become necessary to have money to liquidate these debts and carry on the business of the company, it is resolved that the president make a call of 50 per cent on stock of said company, and that he be authorized to collect the same for the purpose above mentioned, and whereas the said president did make the call on the stockholders; Therefore, be it

Resolved, That the action of the board of directors and president in said resolution and call be, and the same is hereby ratified and confirmed."

(Record page 55.)

EXHIBIT "J."

(No. 3, Adopted—J. C. THOMPSON, *Sec'y.*

"WHEREAS, J. R. Barrett, the president of the Texas & Atlantic Refrigerator Car Company, executed the company's note to J. V. Thurston & Co., for $4000, payable three months after date, as appears from the approval of his action in that respect by the board of directors at a meeting held at Denison, Texas, May 6, 1874; and whereas it satisfactorily appears that such action of said president and board of directors was proper and for the best interest of the company; Therefore, be it

Resolved, That the action of said president in said matter and of said board of directors is approved, and the same be, and is hereby ratified and confirmed."

(Record pages 55-56.)

EXHIBIT "K."

(No. 4, Adopted—J. C THOMPSON, *Secy.*)

"WHEREAS, the board of directors of the company at a meeting held at Sedalia, Mo., on the 10th day of April, 1874, adopted certain resolutions in words and figures, as follows;

Resolved, That the president be, and hereby is, authorized to build and equip a cooling house at Denison, in connection with the slaughter-house there; and resolved as it

is necessary in order to carry on the business of this company to have more money, the president is hereby authorized to borrow such amount as may be necessary for carrying on the business and to give the company's paper therefor, and the company will protect him against any loss by reason of his endorsement as security therefor; which resolution was unanimously adopted ; Therefore be it

Resolved, That the action of the said president in the matter mentioned in said resolution and his acts and doings thereunder and the action of said board of directors in adopting said resolutions are hereby fully and in all respects ratified and confirmed."

(Record page 56.)

EXHIBIT "L."

No. 5, Adopted—J. C. THOMPSON, *Sec'y.*)

"WHEREAS, at a meeting of the board of directors of the Texas & Atlantic Refrigerator Car Co., held at Sedalia, Mo., on the 11th day of March, 1874, the following resolution was adopted ; 'Whereas, the Company made a contract with Geo. H. Hammond & Co., of Detroit, Mich., to furnish cars and money for the purpose of killing beef, and the president of this company made this contract with Hammond & Co., Now, it is resolved, That this action be confirmed and ratified. And whereas, the approval of the acts of said president in the respect mentioned in said resolution, appearing proper and necessary : Therefore be it resolved, that the action of the said president and board of directors in the matter mentioned in said resolution be, and the same is hereby, in all respects ratified and confirmed."

(Record page 56.)

EXHIBIT "M."

(No. 6, Adopted—J. C. Thompson, *Sec'y.*)

"WHEREAS, at a meeting of the board of directors of the Company, held at Sedalia, Mo., on the 12th day of September, 1874, the following resolution was offered and approved by said board :

Resolved, that the president be authorized to sell Joel Ellis, of Chicago, twenty-five thousand dollars of the capital stock of the Texas & Atlantic Refrigerator Car Co., and to take in payment of the fifty per cent. called thereon, a one-third interest in eighteen acres of ground situated near Inglewood, in Cook county, Ills., some six miles from the court house in Chicago, Ill., the deed therefor to be made to A. D. Jaynes, Esq., in trust for this company, was unanimously adopted ;

And whereas, it appears that in accordance with said resolution the president sold said Ellis $25,000 of stock in the company and accepted in payment of the fifty per cent called thereon the land mentioned in said resolution : Therefore, be it resolved, That the action of the President in selling said stock under said resolution and securing payment in accordance therewith is hereby approved and ratified."

(Record pages 56-57.)

EXHIBIT "N."

(No. 7, Adopted—J. C. Thompson, *Sec'y.*)

WHEREAS, from the books of accounts of the Company it is shown that the president thereof has charged the Company with the sum of $5,000 per annum as his salary as president, as also with his his necessary travelling expenses in and about the business of said Company ;

And whereas, it appears that his said services rendered in that behalf were well worth the sum so charged ; therefore be it

Resolved, That the salary and expenses so charged be allowed said president, and that the proper officers of the Company, in settling with him allow him said sums so charged by him.

(Record page 57.)

EXHIBIT "O."

(No. 8, Adopted—J. C. THOMPSON, *Sec'y.*)

Resolved, That whereas, it has been necessary for J. R. Barrett, the president of the Texas and Atlantic Refrigerator Car Company, to act as treasurer for this company, to collect and pay out money of the company, it is hereby resolved that his acts as *de facto* treasurer of this company be, and the same are hereby, ratified, endorsed and confirmed."

(Record page 57.)

EXHIBIT "P."

"We, the undersigned judges of election held by the stockholders of the Texas & Atlantic Refrigerator Car Company, do hereby certify that at the request of the stockholders in meeting on the 10th day of November, 1875, at the office of Philips & Vest, in the City of Sedalia, Mo., we acted as judges, and the vote stood as follows:

J. R. Barrett,	502½ shares,
Joel Ellis,	502½ "
J. C. Thompson,	501 "
E. S. Barrett,	502½ "
F. L. Rankin,	501 "
W. R. Johnson,	2½ "
H. D. Mirick,	2½ "

And we find the first five names elected.

(Signed) J. B. GANTT,
R. C. SNEED."

(Record pages, 57-58.)

The minutes of the proceedings are in the hand writing of J. C. Thompson. The resolutions are in my hand writing, except No. 8, Exhibit "O," the endorsement thereon being in the handwriting of J. C. Thompson, and the certificate of election of directors is in the hand writing of J. B. Gantt,

except the signature of R. C. Sneed, which is in his hand writing. The board of directors' record book was present at that meeting. A statement of the affairs of the company was presented to that meeting. The affairs of the company, and the transactions referred to in the resolutions were explained in full, and discussed before the adoption of the resolutions. The last lot of exhibits correctly shows the proceedings of that meeting. (Witness here produces a paper which he identifies as the original subscription to the capital stock, a copy of which is hereto attached. (See Ante page 5.) I know the signature of R. S. Stevens to the subscription paper and I saw him sign it, and also the words "fifty shares (50)" opposite his name. None of the stock subscribed by Robinson was ever paid in by him, and he never had any certificate, and he refused to pay anything on his stock, and we found nothing could be made out of him. We issued the stock to somebody else. T. L. Rankin also failed to make any payment on his subscription, and no certificate was issued to him therefor. Hyatt afterwards transferred some of his stock to Rankin. Upon reflection I think that Montgomery and Thompson's stock was not transferred to them by me, but they made an original subscription. No certificate of stock was ever issued to Stevens in conformity with the subscription he made. Mr. Stevens acted as director in this Company from its very start till the stockholders' meeting in November, 1875. He was always consulted in regard to the business and knew as much about it as I did. Mr. Stevens paid $1,000 on his subscription of $5000.

We issued stock to the subscribers upon the payment of 50 per cent thereof. Mr. Stevens was entitled to $2.000.00 of stock upon the payment of the $1.000.00. In the certificate book of the company is a stub of a certificate for 20 shares to R. S. Stevens, a copy of which is hereto attached, (See Ante page 5.) This stub is not receipted, and I don't know whether or not Mr Stevens ever received the certificate, but it is detached from the stub, and I don't know where it is.

The writing on the stub is not mine; it is that of L. B. Jackson, the secretary of the company. That certificate of stock was not intended to be in full of the subscription of Mr. Stevens. It was to represent the amount of stock of which the $1.000 payment would be 50 per cent. I don't know whether I signed that certificate as president or not. There was never any release to Mr. Stevens of his $5000 subscription. There was never in any manner any action by the board of directors or the oompany concerning the subscription of Mr. Stevens, or the amount of stock that should be issued to him. This certificate was made out upon the idea of the officers of the company, that they only had the right to issue in double the amount of the payment made.

The business of the Company was slaughtering and shipping beeves in the refrigerator cars over the M., K. & T. R'y, from Denison, Texas, and we were compelled to ship over that road as the only outlet. Mr. Stevens was General Manager of that road. The making of the terms with the railroad was a large element of the profit and success of the enterprise. Mr. Stevens said he would not pay but the $1000, and we could not afford to contend with him at that time because of his position in the railroad, as he could have controlled the whole business and thereby have rendered it unprofitable. Mr. Stevens knew I had become responsible as endorser on the paper of the company. I could not obtain credit for the company without endorsing its paper. At the time of the failure of the Company my liability for it was greater than a fair cash valuation of all its assets. I paid everything that I was endorser upon, including large amounts in addition to that due to the Commercial Bank and Nichols. In addition to those named in the deed of trust before mentioned: I was endorser on note made for $15.000 to the First National Bank of Denison. I sold $5000 worth of stock in that bank for $4,250 and I loaned it to the company and took the note of the company endorsed by Joel Ellis and myself for $4,250, dated May 22, 1875, due one day after date, bear-

ing 10 per cent interest. The note has never been paid to me; I still hold it. (Record pages 46-50.)

Redirect.

I signed a letter to Mr. Stevens, dated Sedalia, Mo., May 13. 1875, a copy of which is hereto attached and marked Exhibit "T." as follows:

EXHIBIT "T."

SEDALIA, MO., May 13, 1875.

COL. R. S. STEVENS, Sedalia, Mo.

Dear Sir:—At a meeting of the board of directors of the Texas & Atlantic Refrigerator Car Co., held at Sedalia, Mo., March 11th, 1875, the following resolution was unanimously passed:

"WHEREAS, this company is in debt and it becomes necessary to have money to liquidate their debts and carry on the business of the company, it is

Resolved, That the president of the company make a call of fifty per cent on the stock of said company, and that he be authorized to collect the same for the purpose above mentioned.

You have twenty shares of capital stock in the Texas & Atlantic Refrigerator Car Company, on which you have paid 50 per cent.

You will please forward to me, as president of the company, at Sedalia, Mo., on or before the 7th of June, 1875, one thousand dollars, being amount due, and I will return you a certificate of full paid up stock. Owing to the misfortunes that frequently occur to a new business and also that some of our stockholders did not take the stock first allotted to them, we have become embarrassed to an extent that we are obliged to make this call on the stock for relief. We have had only thirty three thousand dollars paid in money on stock and twelve thousand five hundred dollars in Chicago property. We enclose you a statement of the assets and liabilities. We think, if the stockholders will pay up promtly that we can make money, and that the stock will be good

property. Our last winter's business made money, and as we have become better acquainted with the business, think the future will give us a profit. We must have money to carry on the business, and to stop would be to sacrifice our property. Hoping you will remit me at Sedalia, Mo., the amount due on your stock, I remain

Yours, very respectfully,

J. R. BARRETT,

Pres. T. & A. Refrigerator Car Co.

(Record page 58.)

Q. In this letter you call upon him to pay 50 per cent. of 20 shares of stock; if he had more than 20 shares of stock in the company, why did you call upon him to pay on only 20 shares?

A. Because he said he would not pay any more and I wanted to avoid any trouble with him.

Q. Who settled the account between you and the company for which the note is given?

A. The book-keeper, I suppose.

Q. Would you have loaned the $10,000.00 to plaintiff and for which you now hold his due bill or note, if he had not agreed to institute and prosecute the suit on the two notes in controversy for your use and benefit?

A. No. The suit was commenced Dec. 11, 1875, on the notes by Nichols against the company.

Q. When you speak about not having released Stevens from the $5,000.00 subscription you mean there was no written or formal release by you or the company?

A. I mean there was no formal release by the company or no verbal or formal release by me, and there was no sort or semblance of a release.

Q. Have you not stated all the notes on which you were endorser for the company, which were not paid out of its assets?

A. Yes; I think I have.

(Record page 50.)

The defendant also read the deposition of L. E. Snow, an insurance agent who testified that he had paid William Nichols $4,400.00 insurance on the property in Denison destroyed by fire.

(Record page 59.)

The defendant then read in evidence the two deeds of trust upon the property in Denison and on the fifty refrigerator cars. And also the trustee's deeds for said property conveying the same to William Nichols.

(Record pages 59-70.)

The defendant then called Henry D. Mirick as a witness, who testified as follows :

" I took ten shares of stock in the Texas & Atlantic Refrigerator Car Company. I was allowed to do so by J. R. Barrett as a special favor. Barrett, the defendant Stevens, and myself all lived at Sedalia at the time the T. & A. Ref. Car Co. was organized. Stevens was the General Manager of the Missouri, Kansas & Texas Railroad Company. The general offices of that company were at Sedalia, Mo. I was in the employ of that company. The M., K. & T. Railroad extended from Denison, Texas, to Hannibal, Mo. When the T. & A. Ref. Car Co. was organized the defendant Stevens proposed it should be done on the following scheme: The company was to slaughter beeves at Denison, Texas, and transport the meat fresh in refrigerator cars from Denison, Texas, to New York City, for sale there, over the M., K. & T. Railway, the Wabash Railway, the Lake Shore & the Erie Railway, each of said roads to furnish a certain number of box cars, which were to be changed into refrigerator cars. The change could be made at small expense to the Ref. Car Co. This would require only a small capital to commence business. J. R. Barrett, the president, agreed to the scheme and promised to carry it out. He went to New York in September following (September 1873) to make arrangements to carry out this scheme, but when he got there and presented his scheme to different persons, they said he ought to have his

own refrigerator cars, and he got puffed up and went up to Springfield, Mass., and made arrangements with the Wasson Manufacturing Company to build one hundred refrigerator cars, instead of getting the railroad company to furnish the box cars and having them changed to refrigerator cars. This put the Refrigerator Car Company in debt $100,000. When Barrett returned to Sedalia and informed Stevens of what he had done Stevens at once told him he would not take 50 shares in the T. & A. Ref. Car Co. with any such arrangement, but said he was willing to take 20 shares to encourage the enterprise. Barrett then agreed that Stevens' subscription should be reduced from 50 to 20 shares, and a call of 50 per cent. on the stock was made and Stevens' call was upon 20 shares, which he paid, and was regarded and treated as a holder of only 20 shares of stock in the T. & A. Ref. Car Co.

Barrett talked with Stevens about the affairs of the company frequently. There were very few meetings of the board of directors. Barrett acted as president, secretary, treasurer, and everything else; in fact he was the company. He called a stockholders meeting on the 10th of November, 1875, to ratify his acts as president. He held a large number of shares of stock, and friends of his held proxies of most of the other stockholders at the meeting. I was present at this meeting as a stockholder myself. Stevens was not there. Barrett got Philips & Vest, as his attorneys, to prepare a series of resolutions ratifying everything that he had done. He presented these resolutions to the stockholders meeting. I opposed and voted against them in the meeting, but he and his friends carried the resolutions by a large majority. Those who held these proxies were all under his control and influence. I made a motion at the stockholders' meeting to have a committee of stockholders appointed to investigate the books and accounts of the Texas & Atlantic Refrigerator Car Company, and report at an adjourned meeting on the 11th of December. The committee was appointed, but I was not put on it, and the meeting never was held and the committee never reported. If Barrett had managed the business of the

company properly it would have made money, and it would not have got in debt. Barrett charged a high salary, $5000 a year, for managing the business of the company. It was too much for a man of his business capacity. It was much higher than the small corporations were then paying for managing their business. In addition to his salary he charged for all his traveling expenses when away on the business of the company, and he travelled a great deal, and his travelling expenses,—his charges against the company for his travelling expenses,—were very large. I have applied to him to let me see the books of the company, but he says that they are lost and cannot be produced. I have never been able to see the books. I was present in Sedalia and heard Stevens frequently talk to Barrett about the business of the company. I was present when Barrett returned from New York and told Stevens that he had contracted with the Wasson Manufacturing Company to build 100 new refrigerator cars for the T. & A. Ref. Car Co., and Stevens disapproved of that contract and Barrett's action in making it. Stevens said it was contrary to the scheme on which he had subscribed fifty shares to the capital stock of the T. & A. R. Co., and he would not take fifty shares in it since the scheme upon which the company had been gotten up had been changed. He said he would only take twenty shares in it. Barrett then said the Company would not hold Stevens for fifty shares, but only for twenty shares.

(Record pages 70-72.)

CROSS EXAMINATION.

Stevens was a director in the company. He did not attend the directors' meetings, but I heard Barrett frequently talk to him and tell him about the business of the Company.

Q. You stated that Barrett had changed the scheme of the corporation; you mean by that, that he bought a lot of cars?

A. Yes, sir.

Q. Didn't you know when you made that statement that it was originally contemplated that the Company would or might purchase cars?

A. I dont know.

Q. You knew what was in the articles of incorporation, didn't you?

A. I suppose so.

Q. I will read them to you and ask you then to state to the jury if it was because of the purchase of cars that Mr. Stevens refused to take more than twenty shares.

(See articles on pages 36-37.)

The witness then answered: "Yes, sir; that was the reason. I have only paid $500 on my stock, and Stevens has only paid $1,000 on his. The books and papers of the company were present at the stockholders' meeting, and the matters complained of in my examination-in-chief were discussed at that meeting."

(Record page 72.)

That was all of the defendant's evidence.

The plaintiff in rebuttal then introduced in evidence the articles of incorporation of the Texas & Atlantic Refrigerator Car Co., duly executed and recorded, and certified to by the Secretary of State of the State of Missouri, which, omitting the acknowledgements and certificates, are as follows:

"This is to certify that we, the undersigned, have associated ourselves together for the purpose of being incorporated under the general statute laws of the State of Missouri, and doing business as such incorporated company as herein specified.

Said corporation or association shall be known or designated by the corporate name of the Texas & Atlantic Refrigerator Car Company.

The object of said company and association shall be to transport and convey any and all sorts of freight, goods, wares, and merchandise, meats, fruits, vegetables, stock, &c,

&c, from any point in the United States to another with or without refrigerator cars, and over any railroads, canals, rivers, or lakes, or by means of any conveyance most convenient, safest and cheapest ; also for the purpose of slaughtering beeves and utilizing the parts in such manner as they deem profitable, and for any other purpose intended for mutual profit and benefit not otherwise specially provided for in these articles of association and not inconsistent with the constitution and laws of this State.

"The amount of the capital stock of said company shall be one hundred thousand dollars, consisting of one thousand shares of one hundred dollars each.

"The business of said company shall be conducted by five or more directors, and R. S. Stevens, J. R. Barrett, W. P. Robinson, F. A. Hyatt and T. L. Rankin shall be such directors and shall manage the affairs of said company for one year from the date of the filing of these articles in the recorder's office, and until their successors are elected and qualified.

The headquarters and general business offices of this company shall be at Sedalia, in the county of Pettis, and State of Missouri, and its said business carried on wherever necessary and desirable.

In testimony whereof we have hereunto set our hands and seals this twenty-third day of July, 1873.

T. L. RANKIN, [Seal]
J. R. BARRETT, [Seal]
F. A. HYATT, [Seal]
W. P. ROBINSON, [Seal]
R. S. STEVENS, [Seal]

(Record page 73.)"

The plaintiff also called J. R. Barrett, who further testified, as follows :

The defendant Stevens was a director in the T. & A. Refrigerator Car Company, from its organization until the 10th day of November, 1875, when an election took place

and some one was elected in his place. He was in New York when I made the contract with the Wasson Manufacturing Company to build the refrigerator cars for the T. & A. Ref. Car Co., and knew about it. I conferred with him about that matter, and then went to Massachusetts and made the contract. He knew as much about the business of the company as I did. I never did anything of importance without his consent. It was some considerable time after this that he said he would take only 20 shares in the Company after that, and I only made a call of 50 per cent. on him on twenty shares. I did not want to have any trouble with him about his subscription to the stock of the company. He was the General Manager of the M., K. & T. R'y at that time, and could have made it so that the T. & A. Ref. Car Co. could not have done business or made any money. I did not release him from his subscription of fifty shares. He said he would only pay for twenty shares, $2,000. and he paid 50 per cent on twenty shares. I have never released Stevens from his subscription, in writing or verbally, and never agreed to. I simply got all the money I could from him and left it for him and the Company to settle as to the balance."

(Record pages 74-75.)

This was all the evidence introduced.

The defendant prayed the Court to give instructions which are set forth at pages 75 and 76 of the record. These the Court refused to give in the form as asked, but charged the jury as follows:

"Nichols, the plaintiff, sues the defendants, Stevens and Mirick, on account of stock subscriptions made by them to the refrigerator company. The plaintiff Nichols claims to be creditor of the company and, having failed to collect his debt because the company had no property he sues the defendant stockholders on their unpaid subscriptions.

It is claimed by plaintiff Nichols that he has a right to maintain this suit, which is denied by the defendants.

The law in Missouri is, that the party in interest—that is, the person to whom the proceeds of the judgment, if any, is recovered will go—must bring the suit.

The purpose of this provision is, that any unsettled matter which may exist between the parties suing and the party sued may be settled in one suit.

The case before us illustrates the propriety of such a provision of law. If, for instance, Barrett is the real party in interest and had brought suit in his own name, these defendants would be entitled to show that Barrett had paid himself out of the property of the company, or had created a liability of the company by making extravagant charges and travelling expenses—indeed, inquire into the whole of the transactions of the corporation of which Barrett was chief officer and manager. Defendants cannot now do this, because Nichols says, I am a creditor and have nothing to do with what the corporation or its officers may have done. It is, therefor, necessary for you to determine whether Nichols or Barrett is the proper person to bring this suit. If you shall come to the conclusion from the testimony in the case that the notes upon which Nichols sued the refrigerator company in the Pettis Circuit Court had in fact been paid by Barrett to Nichols before the suit brought by him in the Pettis Circuit Court, or have been paid by Barrett to Nichols since that time and before he, Nichols, brought the present suit against the defendants, Stevens and Mirick, your verdict should be for the defendants. But, if you shall find from the testimony that Barrett only secured the payment of the notes to Nichols, and did not in fact pay them, in that case, Nichols had the right to sue the defendants and recover judgment against them. As I cannot anticipate what conclusion you may arrive at on this branch of the case, I proceed to instruct you upon the defense set up by the defendant Stevens. It is shown by the testimony that Stevens originally subscribed 5,000 dollars' stock, but it is claimed by him that this subscription was reduced to 2,000 dollars, on which he paid 1,000 dollars, leaving an unpaid balance on his subscription

of 1,000 dollars, instead of 4,000 dollars, as claimed by plaintiff Nichols. Stevens, after he had subscribed 5,000 dollars, could not of his own accord reduce that subscription to 2,000 dollars. This would undoubtedly be the law if an unsecured creditor was suing the defendant Stevens for his claim; but in this case Nichols at most is a secured creditor and can lose nothing in any event. The 1,000 dollars sought to be recovered under one view, as well as the 4,000 claimed under another view, will, under the testimony go to Barrett. Now, if you shall find from the evidence that Mr. Barrett had power to release Mr. Stevens, and the board of directors consented to this release of Stevens from the 5,000 dollars' subscription and claimed the 2,000 subscription only, such a release may justify you in finding a verdict for the unpaid balance on the 2,000 dollars' subscription.

In order to determine as to whether you will hold Stevens for the larger or smaller subscription you may well look at the manner in which Mr. Barrett dealt with this corporation, what power he had as well as what power he assumed, for this suit is for the benefit of Barrett. The change of "scheme" testified to cannot have the effect of releasing any of the parties from their liabilities on their subscription. It is claimed by defendants that they have certain equities against Barrett which by Nichols suing for Barrett they are preventing from setting up. In order to enable you to properly weigh this argument you will recall to mind that the defendants had Barrett's deposition taken, and he came upon the witness stand here. Under the opportunity thus given to show such equities, even to the extent of examining into the correctness of his dealings with the corporation, any failure to bring them out must be considered in weighing the argument of equities. If defendants had such we have a right to look for their being brought out at the time Barrett was testifying.

Under the law parties to a case are permitted to testify."

(Record pages 77-78.)

To this charge and each particular part thereof the defendant excepted.

Thereupon the jury rendered a verdict in favor of the plaintiff Nichols and against the defendant Stevens for the sum of $5,027.33, on which judgment was entered accordingly, and execution ordered to issue against Stevens.

(Record page 20.)

The defendant then in proper time filed a motion for a new trial for the following reasons :

" 1st, Because the Court on the trial of said case admitted illegal, irrevalent and improper evidence on the part of the plaintiff ;

" 2d, Because the Court erred in not sustaining defendant's demurrer to plaintiff's evidence when the plaintiff closed his case ;

" 3d, Because the jury found said verdict contrary to evidence ;

" 4th, Because the jury found said verdict without evidence ;

" 5th Because the Court erred in its charge to the Jury ;

" 6th, Because the Court erred in not charging the jury as requested by the defendants :

" 7th, Because the Court erred in not granting each request to charge the jury as made by the defendants ;

" 8th, Because the jury found for the plaintiff when they should have found for the defendant."

(Record page 79.)

And also a motion in arrest assigning the following grounds :

" 1. Because the facts alleged in the plaintiff's petition do not constitute any cause of action against said defendant, Stevens ;

"2. Because there is no privity of contract between the plaintiff as a judgment creditor of the Texas & Atlantic Refrigerator Car Company, and the defendant Stevens, as stockholder therein, and the plaintiff as such judgment creditor cannot maintain his action at law on his judgment against the said Texas & Atlantic Refrigerator Car Company to recover against said defendant the balance remaining unpaid on his subscription to the capital stock of said company.

"3. Because this court in an action at law has no jnrisdiction over the subject matter of said action to render a judgment therein for the plaintiff and against said defendant for the amount found by the verdict of the jury or for any amount at all.

"4. Because this court sitting only as a court of equity has no jurisdiction to render a judgment for the plaintiff on the judgment described in his petition without suing as well for himself as for all other creditors of the Texas & Atlantic Refrigerator Car Company and making all stockholders in said company who have not fully paid up their stock therein parties defendant to such suit.

"5. Because all the necessary parties defendant are not before this court to authorize it to render judgment for the plaintiff on the judgment described in his petition."

(Record pages 79-80.)

Which motions were overruled and defendant excepted, and filed a proper bill of exceptions, and brings the case here by writ of error.

GEO. P. B. JACKSON,
ATTORNEY FOR WILLIAM NICHOLS,
Defendant in Error.

BRIEF.

I.

The judgment on the notes in the Circuit Court of Pettis County, against the Texas & Atlantic Refrigerator Car Company, is conclusive against the plaintiff in error, as a stockholder in that company, notwithstanding that judgment was by default.

Thompson's "Liability of Stockholders," Secs. 329 and 337
Freeman on "Judgments," Sec. 177.
Milleken vs. Whitehouse, 49 Me., 527
Thayer vs. N. Eng. Lith. Co., 108 Mass., 523-528
State *ex rel.* vs. Rainey, 74 Mo., 229
Ogilvie vs. Knox Ins. Co., 22 How., 380

The judgment concludes the parties and their privies as to all matters which *might* have been put in issue.

Stockton vs. Ford, 18 How., 418
U. S. vs Throckmorton, 98 U. S., 61
Greene vs. Greene, 2 Gray, 361
Christmas vs. Russell, 5 Wall., 290-307
Brooks vs. O'Hara, 8 Fed. Rep., 529

It cannot be attacked collaterally for fraud by the parties or their privies, but remains conclusive against them until reversed on appeal, or set aside in a direct proceeding for that purpose.

Cases above cited, and
Freeman on Judgments, Secs. 132, 334-336

Nor can the stockholder be permitted to show that the debt on which judgment was rendered against the corporation was the debt of its president and not of the corporation.

Donworth vs. Coolbaugh, 5 Iowa, 399.

The above rule would exclude the defenses relied on by the plaintiff in error, that Nichols was not the owner of the notes on which he recovered judgment against the corporation; that those notes had been paid; or that the transactions out of which they arose were fraudulent. But even if such were not the law, there is nothing in these pretended defenses, because the plaintiff in error did not properly plead any supposed fraud, and there was no evidence tending to show any fraud, nor any payment of the notes sued on in the suit by Nichols against the corporation, or that Nichols was not entitled to maintain that suit.

II.

The suit on the notes against the corporation, and the present proceeding were properly brought by Nichols under the circumstances detailed in evidence.

Sections 3462 and 3463, Vol. 1, p. 592, Rev. Stat. of Mo., 1879, have been the law of Missouri, as to parties to actions, since 1865.

Section 3462 provides: Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section. * * * * * *

Section 3463 provides: An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. * * *

The notes were not paid off, and the arrangement between Nichols and Barrett made the former a trustee of an express trust for the benefit of the latter.

Nicolay vs. Fritschle, 40 Mo., 67
Snider vs. Adams Express Co., 77 Mo., 523-527
Webb vs. Morgan, 14 Mo., 429
Beattie vs. Lett, 28 Mo., 596
Simmons vs. Belt, 35 Mo. 461

III.

The pretended release of Stevens from a part of his subscription could not avail him. The directors of a corporation cannot release a stockholder to the prejudice of others, —much less can the president do so,

Upton vs. Triblecock, 91 U. S., 45
Pickering vs. Templeton, 2 Mo. App., 424
Sawyer vs. Hoag, 17 Wall., 610
Burke vs. Smith, 16 Wall., 394

Moreover, the plaintiff in error failed to prove any release.

IV.

It was not necessary that the proceeding against the stockholder should have been in equity.

Flash vs. Conn, 109, U. S. 371

Nor that all the stockholders should be joined.

Ogilvie vs. Knox Ins. Co., 22 How., 380
Hatch vs. Dana, 101 U. S., 205

The provisions of the constitution and laws of Missouri bearing upon the subject are as follows :

The constitution of 1865 as amended in 1870, and which was in force at the time of the transactions upon which the present proceeding is founded, was identical with the constitution of 1875, as follows :

"Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him or her." (See Constitution of Missouri, Article 12, Section 9, Volume 1, R. S. of Mo., 1879, page LXXXV.)

The statutory provisions are, under the head of "General Powers, Duties and Liabilities":

"Section 736. If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned; provided, always, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the person sought to be charged; and upon such motion, such court may order execution to issue accordingly; and, provided further, that no stockholder shall be individually liable in any amount over and above the amount of stock owned."

(R. S. Mo., 1879, Vol. 1, page 121.)

"Section 745. If any company formed under this chapter dissolve leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the company in such suit; and if judgment be rendered and execution satisfed, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they are liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder, respectively; and if any number of stockholders, defendants in the case, shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally amongst all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of such stock owned by the plaintiff at the time the company dissolved."

(R. S. Mo., 1879. Vol. 1, page 123.)

And also, under the head of "Manufacturing and Business Companies:"

"Section 940: No stockholder shall be personally liable for the payment of any debt contracted by

any corporation created under this article, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against the corporation within one year after the debt shall become due ; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such corporation for any debt so contracted, unless the same shall be commenced within two years from the time he shall cease to be a stockholder in such corporation, nor until an execution shall have been returned unsatisfied, in whole or in part."

(R. S. Mo., 1879, Vol. 1, page 172.)

This proceeding can be sustained under section 745, set forth above, although not originally intended to be based on that section.

The proof in the case shows that the T. & A. R. Car Co. had discontinued business and sold all of its property and was insolvent in 1875, when the suit was brought on the notes by Nichols, and that it did no business and had no property after that time, so that when the present proceeding was commenced in 1883, that company was dissolved, for the purpose of enforcing the liability of the stockholders.

St. Sav. Ass'n vs. Kellogg, 52 Mo. 583
Slee vs. Bloom, 19 Johnson, 456-473

The evidence brings this proceeding within the requirements of sections 736 and 940 above. The notes of the Car Company matured in less than a year from their date, and were sued in less than a year after due,—execution was issued against the company and $12.00 made and return of *nulla bona* as to the residue. This entitled the judgment creditor to proceed against the stockholders.

No question has been raised by the plaintiff in error as to the form of the proceeding other than that he contends that he could only be sued in equity, jointly with all other stockholders and for the benefit of all creditors.

In Haskins vs. Harding, 2 Dill., 99, it was held that by reason of section 940, above, stockholders in "Business Corporations" could not be proceeded against by *motion*, as provided in section 736, above, but by *suit* only.

If this is the correct construction of the Missouri statute, then the present proceeding is sufficiently formal to satisfy that view; while on the other hand, if section 736 applies to business corporations, this proceeding is good as a motion, notwithstanding it is more formal than necessary. It was commenced in the court where the original judgment was rendered and execution was issued and returned unsatisfied,—while the result to be attained was the issuing of execution against the plaintiff in error for the amount unpaid on his stock.

Paxon vs. Talmage, 87 Mo., 14

The allegations were the the same as they would have been if the pleading had been called a motion instead of a petition.

The effect, in this instance, of not following literally section 736 of the statute, was not to deprive the plaintiff in error of any right or privilege; but on the contrary, it gave him longer notice, and allowed more time for preparation; it afforded an opportunity of pleading formally, and enabled him to have a trial by jury, all of which he could not have had under a strict and literal pursuit of that section.

Erskine vs. Loewenstein, 82 Mo., 301-305

Because he enjoyed more than he was entitled to the plaintiff in error should not now be heard to object.

Perhaps if regarded as a 'suit' (action) at law, each stockholder should be sued separately, but as a motion, under section 736, the power of the court might be invoked by a single motion to award execution against several stockholders. Such has been the practice in the State courts of Missouri.

Webber vs. Leighton *et al.*, 8 Mo. Ap., 502
Kohn vs. Lucas *et. al.*, 17 Mo. Ap., 29

No objection having been taken to joining two stockholders, the misjoinder, if such there was, was waived, if not made before trial.

Pacific R. R. vs. Watson *et al.*, 61 Mo., 57-60
Kellogg vs. Malin, 62 Mo., 429-431
Loeding vs. Bartlett, 35 Mo., 94
Russell vs. Defrance, 39 Mo., 511

V.

This proceeding may not have been movable to the Federal Court: but the plaintiff in error procured the removal for his own benefit and is now estopped to question the regularity of it.

Bushnell vs. Kennedy, 9 Wall., 387-393
Seward vs. Comeau, Case Number 240. Decided March 21st, 1881.
(See Book 26, p. 438, Lawyers' Ed. U. S. S. C. Reps.)
Ayres vs. Watson, 113 U. S., 594

GEO. P. B. JACKSON,
Attorney for Defendant in Error.

ARGUMENT.

The evidence, as preserved in the record, establishes the following state of facts. In 1873 the T. & A. R. Car Co· was incorporated under the laws of the State of Missouri, with its principal office at the City of Sedalia, in that State. The plaintiff in error was one of the original incorporators and subscribed and agreed to pay for $5,000 of stock in that Company. Immediately upon the organization, as was required by law of Missouri, 50 per cent. of the subscriptions to the stock was called. The plaintiff in error at that time was the General Manager of the M., K. & T. Railway Co., over which the Refrigerator Co. was compelled to transact its business, and the arrangements and terms for shipments that it might make with the railroad company was an important element in the success of the refrigerator enterprise. The plaintiff in error, Stevens, was selected as one of the original directors of the company, as was also one J. R. Barrett, the latter being made the president of the company; these two were the most active of all the stockholders or directors in the management of the business of the Refrigerator Co. Barrett was the active manager of its affairs, and upon all matters of any importance, he consulted with and took the advice of the plaintiff in error, Stevens. Shortly after the organization of the Company it was determined by the directors, and especially by Barrett and Stevens, upon full consultation, that it was necessary for the company to purchase a lot of refrigerator cars, and thereupon it did purchase from the Wasson Manufaturing Company, in Massachusetts, 50 cars, at a cost of about $70,000 buying the same on credit, or nearly so, the sale being a conditional one, and the title to the cars remaining in the manufacturing company until they were paid for,

Some of the subscribers to stock failed to pay anything, some paid the 50 per cent. first called, while the plaintiff in error, Stevens, only paid $1,000.

The business of the company did not prove a success. It however paid something over $40,000 on the purchase of the cars, but in the meantime was compelled to borrow large amounts of money and in order to effect these loans it became necessary for Barrett to endorse the Company's paper, which he did, under the authority of a resolution of the board of directors—making the notes of the company to his own order, and then endorsing them to the parties from whom he procured money. Altogether he thus became liable, as the surety for the refrigerator company, in an amount exceeding $40,000. In May, 1875, a call was made upon the stockholders for the remaining 50 per cent. of the subscriptions; Barrett paid up his stock in full, amounting to $25,000, a few others also paid in full. The plaintiff in error, Stevens, however made no other payments than the $1,000 already mentioned and arbitrarily declined to pay his $5,000 subscription. By reason of his position as General Manager of the railroad, he had the power to utterly ruin the business of the corporation, which was already in an unprosperous condition. To avoid any controversy with him, Barrett, the president of the Company, did not press him for payment. It does not appear that any others of the directors or stockholders knew that Stevens declined to pay his subscription in full. Barrett, in his testimony, swore very positively, that he never in any manner released Stevens from any portion of his subscription or undertook to do so: that he simply accepted from Stevens what he would voluntarily pay, and left it as a matter to be settled between Stevens and the Company.

In the year 1875 the directors authorized the president to execute deeds of trust upon the property of the company, which consisted of the equity of redemption in the 50 refrigerator cars above mentioned, a small tract of land with a slaughter-house, and the machinery and aparatus in the same in Denison, Texas, and also a third interest in a

tract of land in or near Chicago, which had been taken as a payment upon a subscription to the stock. These deeds of trust were to secure various notes of the refrigerator company, upon which Barrett was surety—among others, two notes which are the foundation of this controversy, due to the Commercial Bank of St. Louis for the sums of $5,800 and $4,200 respectively. In the latter part of the year 1875 the affairs of the refrigerator company had attained such a condition that it was compelled to discontinue business altogether, and the several deeds of trust upon its property were foreclosed. At this time the Commercial Bank, of St. Louis, held $20,000 of the Company's notes, and William Nichols, the defendant in error, held a note for $2,500. on all of which Barrett was surety. There was then due to the Wasson Manufacturing Company about $30,000 on the purchase price of the cars. Nichols became the purchaser of all the property at the sales. The deeds reciting that his bid was $2,000 for the lot of ground and aparatus in the slaughterhouse, and the equity in the refrigerator cars, and $5000 for the tract of land near Chicago; which after deducting costs would have been applicable to the $22,500 of debts held by the Commercial Bank and Nichols, and on some $11,000 or $12,000 of other debts secured by the same deeds of trust and on which Barrett was also surety. The Commercial Bank of which Nichols was then cashier was pressing Barrett for the payment of these debts which it held against him as surety for the company; and he not having the money to pay but being possessed of a valuable farm near Sedalia, an arrangement was made between Nichols and himself to the following effect: that Nichols should take up all the notes held by his bank and himself and carry them until Barrett could procure a loan upon his land, and that Barrett should procure such a loan and pay off the various debts upon which he was surety, except the two notes for $5,800 and $4,200, given and endorsed to the Commercial Bank; that out of the loan thus procured, he would loan Nichols $10,000, taking his note or due bill therefor, and that Nichols should retain

the title to the two notes last mentioned, and bring suit upon them against the refrigerator company, and then proceed against the stockholders to enforce payment of their subscriptions, and that what he realized thereon he was to pay Barrett on the note or due bill he had given him, but if he never got anything then he was to be entitled to offset the two notes on which Barrett was surety against the note or due bill which he would give to Barrett. Barrett was also to have the benefit of whatever Nichols could realize out of the property which he had bought in under the deeds of trust. Barrett did procure a loan for $35,000 on his land, and out of the proceeds placed the $10,000 in Nichols' hand, who had already taken up the notes from the bank, paid off the other notes that had been held by the bank and Nichols, and then all held beld by Nichols, and paid the balance of the loan to the other parties holding the notes on which Barrett was liable. Barret also paid off, out of other sources, all the notes upon which he was surety for the company, which were all the debts it owed, unless it was for the purchase money due for the cars.

In pursuance of this arrangement Nichols instituted suit in his own name against the Refrigerator Car Company, on the two notes for $5,800 and $4,200. These notes were dated in May, 1875, and became due three months after date. The suit was instituted on the 11th of December, 1875, in the circuit court of Pettis County, Mo.; judgment was rendered in favor of Nichols and against the Refrigerator Car Co., in January, 1876: execution was duly issued and returned unsatisfied, except as to $12, because no property of the Car Company could be found out of which to make the same; afterwards, the present proceeding was instituted in the circuit court of Pettis County to recover the amount remaining unpaid on the subscription to stock made by Stevens.

In the meantime, however, the slaughter house which had been bought in, under the deed of trust, by Nichols, was burned down; he sold the lot for $150 and collected $4,400 insurance, which, after deducting expenses of

the sale and collecting the insurance, etc., some $400 or $500, he turned over to Barrett. He leased the refrigerator cars to the Missouri, Kansas & Texas Railroad for a time, but the rental was not sufficient to pay the interest on the debt to the Wasson Manufucturing Company for the purchase of the cars; after renting them for awhile he sold the cars to the M., K. & T. Railway Co., for the sum of $30,000.00, payable in monthly installments of $600 each. Prior to the sale of these cars to the railway company, Barrett with the insurance and other money had reduced the debt to the Manufacturing Company to $22.000.co ; as the Manufacturing Company still held the title to the cars as security for their debt, the obligations of the Railway Company were turned over to the Manufacturing Company, which in turn transferred them, together with their lien on the title to the cars, to the Agawam Bank in the State of New York. As those obligations exceeded the amount due on the cars by $8,000, the Agawam Bank loaned Barrett that amount on his note, and when the Railroad Company paid the whole of the $30,000.00 they applied $8,000.00 of it on this note of Barrett's and returned the note to him.

This was the state of facts at the time that the plaintiff in error was notified of the present proceeding then pending in the Pettis Circuit Court; he then appeared in that court, and because he was a citizen of the State of New York, and Nichols was a citizen of the State of Missouri, he procured the removal of the case to the United States Circuit Court, where he filed an answer claiming that the notes upon which Nichols had sued the Refrigerator Company had been paid off before that suit; that he was not the owner of the notes; that the transactions out of which they arose were fraudulent; and that Barrett had executed the notes without any authority and had used them for his own private advantage and purposes; all of which was denied in a replication filed by Nichols, with a further plea that all such matters were concluded by the judgment upon the notes against the corporation in which Stevens was a stockholder.

I.

As to the question of the ownership of the notes; whether they were paid off or not at the time that Nichols sued on them; or whether there was or not any fraud in the conduct of Barrett in executing and using the notes, could not be inquired into in this collateral proceeding after the judgment had been rendered against the corporation The authorities cited in the brief establish beyond question that a judgment against a corporation is conclusive, as against the stockholders, of all defenses which might have been made in the suit in which the judgment was rendered, and it is immaterial whether the judgment was rendered by default or otherwise. The plaintiff in error prayed the Court to instruct the jury, that as the summons in the case of Nichols against the Refrigerator Car Company had been served on Barrett, and that as the judgment had been entered by default, it was therefore void. The service upon Barrett as president of the company was proper. Sections 25 and 26, page 294, Vol. 1, Wagner's Missouri Statutes, 1872, provide as follows :

"Section 25. In all actions which may be instituted against any corporation or incorporated company, it shall be sufficient to issue a summons commanding the corporation, by their corporate name, to appear and answer the action ;

"Section 26. When any such summons shall be issued against any banking or other incorporated company, service on the president, or other chief officer of such company, or, in his absence, by leaving a copy thereof at any business office of said company with the person having charge thereof shall be deemed a sufficient service."

In view of tne fact that the company had discontinued business and there was no one in charge of or attending to the business affairs other than Barrett, the president, it is apparent that the only way in which service could be obtained upon that corporation was by service upon the president.

The question of the ownership of the notes, and whether they were paid or not, as well as whether or not they were rendered void or voidable by any existing fraud, were clearly matters that could have been inquired into in that suit, and so far as the effect of the judgment is concerned, it is wholly immaterial whether they were investigated or not. But waiving, for the purpose of argument, any such rule as to the effect of the judgment, it cannot now be seriously contended, that there was anything improper in the conduct of Barrett in his dealings with the company, or that there were any circumstances of a fraudulent nature that could impair the notes which Nichols and the bank, of which he was cashier, held. It is true that the plaintiff in error, in his pleadings, boldly charges that there was fraud of some kind, somewhere, but he does not anywhere undertake to state any facts or circumstances from which fraud may be inferred. How utterly groundless is this charge is made manifest from the course pursued by the plaintiff in error with reference to this suit, and by the character of evidence that he introduced. He, himself, caused to be taken the depositions of Nichols and Barrett, and he read them upon the trial. These disclosed fully the nature of the transactions, and if anything could be settled by testimony it was, that these notes were given for *bona fide* indebtedness of the company. and that Mr. Barrett, at the risk of great personal depositions of Nichols and Barrett, and he read them upon the trial. These disclosed fully the nature of the transactions, and if anything could be settled by testimony it was, that these notes were given for bona fide indebtedness of the company, and that Mr. Barrett, at the risk of great personal loss, and as the only means of securing financial assistance for the company had become individually liable on all of its indebtedness. The plaintiff in error also introduced his particular friend Mirick as a witness. When he had concluded, the only thing to be inferred from his evidence was, not that there had been any fraud in the giving, or in the use of these notes, but that the plaintiff in error, Stevens, had been im-

posed upon, because Barrett, as president of the company, had purchased the refrigerator cars above referred to, instead of taking ordinary box cars and altering them into refrigerator cars. This pretention seems too ridiculous to merit any consideration, but it becomes even more insignificant when the same witness tells us that he, himself, had frequently heard Stevens discussing the affairs of the refrigerator company with Barrett. Stevens was a director, and by reason of his position as General Manager of the M., K. & T. Ry., it is very reasonable to believe, as Mr. Barrett informs us, that he was consulted upon every matter of any importance, and as Mr. Barrett expressed it, he knew as much about the business of the company as Barrett, himself, did. Barrett also testified, without any attempt at contradiction, (and this evidence, plaintiff in error, himself, introduced) that he, Barrett, conferred with Mr. Stevens specially upon the matter of the purchase of the cars, and that Stevens approved it, and with his sanction and approval they were purchased. It is idle then to talk about any unfairness towards, or imposition upon Mr. Stevens by reason of that transaction; and it certainly offers a very weak foundation for the pretense that he had been released from any portion of his subscription.

The witness, Mirick, testified that by reason of the change of the scheme from using and altering old cars to buying new ones, Mr. Stevens, the plaintiff in error, had refused to pay for any more than $2,000 of the stock, and that he had thereupon been released. Barrett emphatically denied that there had ever been any talk of a release, or that there had ever been any attempt or intent to release Stevens. Stevens had arbitrarily, by reason of the advantage of his position as General Manager of the M., K. & T. Ry., refused to pay and under the existing emergencies of the company, Barrett considered it better to let the matter rest for the time being, rather than to arouse the opposition and antagonism of Stevens and thereby at once subvert the whole enterprise by reason of the hostility of the railroad management.

It is worthy of notice in this connection, that although the deposition of Barrett had been taken, and was on file a long time before the trial, in which, in an emphatic manner, he denied all fraud of every character; denied that there had been any release of Mr. Stevens; asserted positively the sanction and approval of Stevens of all that had been done, and with great particularity had detailed all the affairs of the company, yet the plaintiff in error, Stevens, wholly abstained from giving any testimony in the case. Ordinarily we would expect the party who had set forth such grievous wrongs in his pleading to have appeared, and at least have attempted to substantiate them with his testimony. We can only conclude that he was unable to endorse under oath the reckless statements that had been made in his answer. Upon these matters, then, it is submitted that the charge of the Court as well as the verdict of the jury were fully warranted by the evidence, and should be sustained.

II.

While it does not appear that there was any necessity for prosecuting the suit in the name of Nichols, yet the fact that it was so done does not impair the force of the judgment nor affect the rights of the parties. It is true, for it is so stated by both Nichols and Barrett in their testimony, that the suit against the corporation as well as the present proceeding was for the benefit of Barrett. Barrett could have accomplished, it is true, just as much in his own name, or just as much if he had instituted the suit, and Nichols could do no more in that respect than Barrett could. But they had the impression that the matter could be brought to a more speedy determination if Nichols was the plaintiff; that they were mistaken in this will not render the proceeding improper or void, and it must be sustained unless there is some reason or rule in law that prohibits it. It is true that the Statute of Missouri says that every action should be prosecuted in the name of the real party in interest, except that a trustee

of an express trust may sue in his own name. The terms of the agreement entered into between Nichols and Barrett, made Nichols such a trustee, because it was expressly provided in order to accomplish the settlement of all the indebtedness held by him and his bank, that he should procure these particular notes from the bank along with the others; that all the others should be paid, but that these should not be, and that he should prosecute the necessary proceedings to recover all that could be from the delinquent stockholders, and apply the same to the settlement of these notes. The express provision of this agreement was, then, that he should be a trustee to collect this money for Barrett's benefit, and as such the Missouri Statutes give him the right to maintain the suit. But independent even of such an agreement , the suit was properly maintainable by Nichols. Barrett, it will be remembered, was the endorser upon these notes; if he had paid them directly to the bank as the holder of them, they would simply have been returned to him, his endorsement would have been cancelled, and he would have been the payee in the notes, and entitled to sue the company upon them. Had he taken and held the notes in that way he could have transferred them to any one for collection, and that person could have maintained a suit upon them in his own name, because, by the transfer and delivery such other person would have become vested with the legal title to the notes.

The cases cited in point II of the brief, *ante*, establish the rule in Missouri that a party, to whom notes are transferred for collection, may maintain a suit in his own name notwithstanding he has no actual interest in the notes, or in the money to be realized. Then, as Barrett could have turned these over to any one for collection so that that person might have sued, certainly he could arrange with Mr. Nichols, that he should take a transfer of the notes for the purpose of collection, and thereby become authorized to sue upon them in his own name. Such, in effect, is what the agreement between Barrett and Nichols amounted to. If

Barrett had been gaining any undue advantage over the corporation, or any of its stockholders, by this arrangement, it might be regarded with suspicion; but when our attention is directed to the evidence in the case, and we see that Barrett had endorsed all the paper of the company, and, by reason of its insolvencey had become personally liable for its total indebtedness, and that he had before the present proceeding was instituted, paid off every dollar of that indebtedness himself, and suffered a very considerable loss on account of it, it is not possible to conjecture how he was injuring any one by this arrangement. The evidence shows that he was liable to the Commercial Bank in the sum of $20,000, to Nichols $2,500, to the North Granville Bank of New York $5,000, to the First National Bank of Sedalia $2,500, to J. C. Thompson $2,500, to the Sedalia Savings Bank $1,500, to to the First National Bank of Denison, Texas, $15,000, and on the notes given for the cars to the Wasson Manufacturing Company $28,000. In addition to all this, he had loaned, of his own money, $4,250, to the company, for which he held its note, (which was never paid), making a total of $81,000 which the refrigerator company owed; and for which Barrett was liable, except the $4,250, due to himself. On this indebtedness there were paid, the $30,000 from the M., K. & T. Ry. on the purchase of the cars; $4,400 insurance on the slaughter house, and $150 for the lot,—leaving, after expenses were paid, in round numbers $34,000. Nichols bought in the Chicago property at $5,000, and considering that as a payment, and adding it to the other items, it makes a total of $39,000, still leaving a deficiency on the debts of the company which Barrett has paid $42,000. Certainly it was not possible for him under these circumstances to accomplish any injustice by requiring, either directly in his own name or through the agency of Mr. Nichols, the delinquent stockholders to pay what still remained unpaid on their stock. There were no creditors to be harmed because he had paid all the debts, and was the only creditor; as a stockholder himself, he had paid in full his $25,000 of stock. Through the

kindness and generosity of Nichols he had been allowed the benefit of all that was realized upon the property which Nichols had bought in under the deeds of trust, although it amounted to more than Nichols could have been charged with, and yet he still has a claim for $42,000 against the company unsatisfied, and yet it is pretended that Nichols and Barrett have entered into a conspiracy to do great wrong, when they seek to recover a small portion of the amount justly due to Barrett by enforcing the liability against a stockholder.

III.

The plaintiff in error has also contended that, in order to recover from him any balance remaining unpaid on his stock, it was necessary to bring a suit in equity for the benefit of all creditors, and against all the stockholders. He has not suggested that there were any creditors, or stockholders omitted; on the contrary, the evidence establishes, as shown before, that this suit was being maintained by the trustee of an express trust for the benefit of the only creditor, and the evidence discloses further, that a portion of the stockholders had paid up their stock in full, and hence were not liable for any more, and that except Stevens and Mirick, the others were beyond the jurisdiction of either the Circuit Court of Pettis County, or the United States Circuit Court for the Western District of Missouri, and that wherever they were they were hopelessly insolvent. This very showing would have excused the bringing in of any other stockholders; but, as decided by this court, it is not necessary that the suit shold be brought in equity. Under the Missouri Statutes, it is clearly contemplated, that a more speedy and a simpler proceeding than a bill in equity should be available to a creditor of a corporation to enforce the liability of the stockholders. The provision of the constitution upon the liability of stockholders, and the sections of the Statutes relating to that liability and its enforcement, are set forth in the brief. The only criticism that

can be fairly made upon this proceeding was never raised b the plaintiff in error, but was suggested by his Hono Justice Miller, who heard and determined the motion for new trial in this case at Kansas City, and that is, whethe or not it was proper to have commenced this proceeding b a petition instead of a motion. It is believed that the fact as developed upon the trial of this case would sanction proceeding under Section 745 as quoted in the brief, althoug it is admitted that the proceeding was not intended, when com menced, to be based upon that section. The evidence show that before this proceeding was commenced the corporatio had entirely discontinued business, and that all of its asse had been disposed of, and it was hopelessly insolvent. This it has been decided in Missouri, as well as elsewhere, is suf ficient to constitute a dissolution of the corporaiion, so far a creditors are concerned, and so far as a dissolution is neces sary to warrant a proceeding against the stockholders. It i true, that all these facts were not alleged in the petition, ye the proof was admitted without objection, It is equally tru that the corporation was joined as a defendant while the stat ute says that suits *may* be brought against any person, o persons who were stockholders at the time of such dissolutio without joining the company in such suit. Still, the cas was dismissed as to the corporation before judgment. How ever, it is not necessary to contend that this proceeding shal find its sanction in Section 745.

Section 736 in Article 1 of the chapter upon Cor porations, under the head of "General Powers, Dutie and Liabilities," is to be construed in connection wit Section 940 in Article 8 of the same chapter, unde the head of "Manufacturing and Business Companies." The former of these sections provides, that if an executio shall have been issued against any corporation, and ther cannot be found any property whereon to levy the same, the execution may issue against any of the stockholders to th extent of the amount remaining unpaid on their stock, bu requires that before such execution issue against th

stockholders that a motion for that purpose must be made in open court after sufficient notice in writing. The latter section provides that no stockholders shall be personally liable for any debt contracted by the corporation unless the same is to be paid in one year from the time it is contracted, nor unless a suit be brought against the corporation within one year after the debt becomes due, and then proceeds- "and no *suit* shall be brought against any stockholder who shall cease to be a stockholder" * * * * * * * "unless the same shall be commenced within two years from the time he shall cease to be a stockholder, nor until an execution (against the corporation) shall have been returned unsatisfied in whole or in part."

At the time the present proceeding was commenced the proper manner of proceeding against a stockholder was rendered uncertain, and was surrounded with some confusion by reason of the fact that in the State courts the practice had been to proceed by motion, while Judge Dillon in the case of Haskins vs. Harding; 2 Dill. 99, decided that a practice by motion did not apply to a business corporation, but that a stockholder in such corporation could only be proceeded against by suit. This proceeding, having been brought at the time of these conflicting views, is in a form that will satisfy either of them. If the case of Haskins vs. Harding is correct, then this proceeding is sufficient, because it has all the formalities, characterizing a *suit* under the Missouri practice. Strictly, it may be contended, the word "suit" signifies a proceeding in equity, as distinguished from an action at law. This, however, is not the meaning of the word as used in this section of the Statute. Throughout the Missouri Practice Act the word "suit" is used as in common parlance, and comprehends all proceedings whether at law or in equity. This is apparent further, from the use of the same word in the former part of the section where it speaks of a "suit" for the collection of the debt, and it is further evident that this is not intended to mean a proceeding in equity, because the very purpose in

can be fairly made upon this proceeding was never raised by the plaintiff in error, but was suggested by his Honor, Justice Miller, who heard and determined the motion for a new trial in this case at Kansas City, and that is, whether or not it was proper to have commenced this proceeding by a petition instead of a motion. It is believed that the facts as developed upon the trial of this case would sanction a proceeding under Section 745 as quoted in the brief, although it is admitted that the proceeding was not intended, when commenced, to be based upon that section. The evidence shows that before this proceeding was commenced the corporation had entirely discontinued business, and that all of its assets had been disposed of, and it was hopelessly insolvent. This, it has been decided in Missouri, as well as elsewhere, is sufficient to constitute a dissolution of the corporaiion, so far as creditors are concerned, and so far as a dissolution is necessary to warrant a proceeding against the stockholders. It is true, that all these facts were not alleged in the petition, yet the proof was admitted without objection, It is equally true that the corporation was joined as a defendant while the statute says that suits *may* be brought against any person, or persons who were stockholders at the time of such dissolution without joining the company in such suit. Still, the case was dismissed as to the corporation before judgment. However, it is not necessary to contend that this proceeding shall find its sanction in Section 745.

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stockholders that a motion for that purpose must be made in open court after sufficient notice in writing. The latter section provides that no stockholders shall be personally liable for any debt contracted by the corporation unless the same is to be paid in one year from the time it is contracted, nor unless a suit be brought against the corporation within one year after the debt becomes due, and then proceeds- "and no *suit* shall be brought against any stockholder who shall cease to be a stockholder" * * * * * * * "unless the same shall be commenced within two years from the time he shall cease to be a stockholder, nor until an execution (against the corporation) shall have been returned unsatisfied in whole or in part."

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enacting these various sections of the statute, was to avoid the expense and tedious delays of a suit in equity, and to furnish a simple remedy for the enforcement of the liability of stockholders.

If Judge Dillon was wrong in the opinion expressed in Haskins vs. Harding, and if a creditor of a business corporation has the same right to proceed by motion that the creditor of any other corporation has,—and no good reason appears why he should not,—still, this proceeding can be sustained under section 736. The fact that the paper, which was filed at the commencement of this proceeding was called a *petition* instead of a *motion*, cannot change its nature or purpose. If it had been called a *motion* it would have been necessary that it set forth everything that it now contains. It should have advised the court of the judgment that was rendered against the corporation; of the issue of execution upon that judgment and of the return of *nulla bona*. It should also have informed the court that the person against whom the further process of the court was desired was a stockholder in that corporation and that a certain amount remained unpaid on his stock. If the proceeding had been by simple motion only a notice would have been required to have been served upon the stockholder. Under Section 3507, page 600, Vol. 1, R. S. of Mo., 1879, which reads, "notices shall, unless a different time is prescribed by law, or the practice of the court, be given at least five days before the time appointed for the hearing of the motion, pleading or other proceeding, if the person to be served reside within fifty miles, of the place where the hearing was to be had, etc." The plaintiff in error, who was served in Sedalia, would have been entitled to but five days' notice before the motion could have been heard. The hearing upon the motion would have been summary, without the advantage of framing an issue by counter pleadings on the part of the plaintiff in error and without a trial by jury. Whereas, by designating the paper filed a *petition*, a summons was issued on the same and the

plaintiff in error was thereby entitled, or required to be served fifteen days before the first day of a regular term of court, and at the first term he would only be required to file such pleadings as he desired to, and the case would then stand over to the next term for trial, when he could have, as he did in this case, a trial by jury. This all shows that no privilege or advantage was denied the plaintiff in error by designating the paper as a *petition* instead of a motion, and as everything that was necessary to be set forth or to be done in a proceeding entitled as a *motion*, there certainly is no valid reason for complaint. The plaintiff in error made no objection of this character, but availed himself of the superior advantages afforded him under the particular form of the proceeding adopted, and he should therefore be held to have waived any such objection. To contend now that the proceeding should have been entitled by motion instead of by petition is to struggle for the shadow and lose the substance.

In a proceeding against a stockholder by motion the Supreme Court of the State of Missouri, in the case of Erskine v. Loewenstein, 82 Mo., pages 304, said:

"Respondent objects to the consideration, by this court, of any imputed error of the trial court, for the reason that the bill of exceptions does not show that plaintiff excepted at the time to the action of the court in overruling the motion for execution against the defendant. We think this is a misaplication of the rule invoked by respondent. That rule applies to motions such as are incidental to the trial of the principal proceeding, and not to a case like this, where the motion is the principal proceeding, the foundation of the litigation. This motion takes the place, under the statutory provision, of the suit in equity at common law, to reach assets in the hands of the stockholder; and, to a certain extent, should be treated as a petition. The refusal of the Court to grant the motion is a finding of the issues for the defendant. The remedy for the error of the Court in making such finding is by motion for new trial and exception, at the time, to the action of the Court in overruling this

motion, as was done in this case. * * * * * As above suggested, this proceeding by motion is summary and we are disposed to treat it, in this respect, as a statutory substitute for a bill in equity. The statute, evidently, contemplates a hearing and determination of this motion by the court without the intervention of a jury."

Under that view of the matter the motion is regarded practically as a petition, and has the same relation to the proceeding. The identical question occuring in this case has not been passed upon by the State Courts, but in the case of Paxon vs. Talmage, 87 Mo., page 13, an analogous question arose. There a creditor, after having had execution returned *nulla bona* against a corporation, commenced a proceeding by a *petition* against a stockholder in a court *different* from the one where the judgment and execution had been obtained against the corporation, and that petition did not ask for judgment, but simply for an order for execution against the stockholders. Inferentially it is decided, in that case, that, if the prayer had been for judgment, it might possibly have been sustained in the different court, but more clearly, if the proceeding had been in the court in which the judgment against the corporation had been rendered, then the petition might have been regarded as a motion. The Court says in that opinion :

"The amended petition in this cause does not ask for judgment against the defendant as a stockholder, but only for an order for execution against him, and that on the basis of the judgment already rendered against his corporation in another court. This being the case, it is quite obvious that the amended petition *can only be treated as a motion* for an order for an execution under the section mentioned. And since that petition is not filed in the court where the judgment was obtained it can but result that the plaintiff must fail by reason of not having followed the provisions of the statute in such case made and provided."

As this proceeding was commenced in the circuit court of Pettis County, which rendered judgment against the cor-

poration, the application of the case of Paxon vs. Talmage sustains the position contended for by the defendant in error, that the proceeding may be regarded as a sufficient compliance with section 736, providing a proceeding by motion. Especially should this be the effect after judgment without any previous objection or exception on this account.

Believing that the plaintiff has not suffered injury by anything that occurred in this proceeding, but that substantial justice has been done, and the judgment rendered for the right party, I submit that the case should be affirmed.

GEO. P. B. JACKSON,

Attorney for Defendant in Error.